PREVENTION OF OFFENCES

BY

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PREFACE.

It was the late Mr. Dasarathi Sanyal who suggested to me the idea of writing a book like the present and it is my lasting regret that the book could not be published during his life-time.

The book is not a mere digest of cases but a commentary on the law on the subject. It is a matter of common knowledge that a large percentage of the cases that come up before the Criminal Courts arises out of proceedings taken in the Preventive Jurisdiction of the Courts. The importance of these proceedings and the numerous reported decisions on the subject justify the treatment of the law relating thereto in a separate book by itself. The provisions in the Code of Criminal Procedure relating to preventive proceedings are to be found in different parts of the Code and I have in Chapter II of the book collected all these provisions in one place and tried to arrange them in a logical order. In the Appendix I have given in extenso the other important statutes relating to prevention of offences. In order to enhance the usefulness of the book the sections are also printed in appropriate places along with the commentary.

Working with the fundamental idea of a commentary I was not forgetful of the need of the busy practitioner for a book of ready reference. The notes have been arranged under appropriate headings in bold type so as readily to attract notice. In selecting cases I have drawn both from authorised (official and non-official) and unauthorised reports. The latter I could not exclude because many important decisions are to be found reported therein. Altogether some one thousand cases have been noticed in the book. In commenting on a reported decision I have not blindly advocated the correctness of the view taken but have pointed out all that can be said against it where it is open to adverse criticism.

The appreciative reference by Sir John Woodroffe in his commentary on the Code of Criminal Procedure to the criticisms of the amendment of the Code in 1923 which I contributed to the

Calcutta Weekly Notes encouraged me to pursue the discussion further in this book and I have in several instances pointed out the necessity of further amendment of the Code which is still necessary in spite of the careful overhauling in 1923.

In order to make the book useful for students special chapters have been devoted to general statements of the law without the citation of rulings.

I have tried to make the book useful to the Bench and the Bar and have inserted in it all that seemed to be of importance in the light of my own experience and it is for those who will use it to say how far I have succeeded. Any suggestion for improvement will be gratefully received.

I was particularly anxious to give the book a decent get-up and in this respect the publisher has spared no pains.

I cannot conclude this preface without expressing my thanks to Mr. Narendro Kumar Bose, Advocate, from whom I received much encouragement when I first prepared my notes for annotating the Code of Criminal Procedure several years ago.

My thanks are also due to Mr. Probodh Kumar Samadar, M.A., B.T. of the Art Press for helping me in reading proofs.

BHOWANIPUR,
December, 1927.

S. C. M.

To

THE REVERED MEMORY

OF

THE LATE

MR. DASARATHI SANYAL

THIS BOOK

IS RESPECTFULLY DEDICATED

BY HIS PUPIL

THE AUTHOR

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Page 139 For (Emp. *v.* Yakoob) 43, Bomb. 534, read 43, Bomb. 554.
Page 147 For (Rahimuddin Howladar *v.* Emp.) 35, Cal. 1903, read 35, Cal. 1093.
Page 147 For (Ponnusawmy Naidu *v.* Emp.) 30, 470, read, 36, Mad. 470.
Page 173 For (Bahadur Molla *v.* Ismail) 92, C. W. N. 463, read 29, C. W. N. 463.
Page 222 For (Basdeo) 26, All. 196, read 26, All. 190.
Page 223 For (Chinnathambi Rowthan) 9, M. L. J. 271, read 9 M. L. T. 271.
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LIST OF ABBREVIATIONS.

A	*I. L. R., Allahabad Series.*
A. W. N.	*Allahabad Weekly Notes.*
A. L. J.	*Allahabad Law Journal.*
B.	*I. L. R., Bombay Series.*
B. H. C. R.	*Bombay High Court Reports*
B. L. R.	*Bengal Law Reporter.*
Bomb. L. R.	*Bombay Law Reporter.*
Bur. L. T.	*Burma Law Times.*
C.	*I. L. R., Calcutta Series.*
C. W. N.	*Calcutta Weekly Notes.*
C. L. J.	*Calcutta Law Journal.*
C. L. R.	*Calcutta Law Reports.*
Cr. L. J.	*Criminal Law Journal.*
I C.	*Indian Cases.*
K. B.	*Law Reports, King Bench.*
L.	*I. L. R., Lahore Series.*
L. L. J.	*Lahore Law Journal.*
M.	*I. L. R., Madras Series.*
M. L. J.	*Madras Law Journal.*
M. W. N.	*Madras Weekly Notes.*
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N. W. P. R.	*North Western Province High Court Reports.*
O. L. J.	*Oudh Law Journal.*
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O. C.	*Oudh Cases.*
O. A. L. R.	*Oudh and Agra Law Reporter.*
P.	*I. L. R. Patna Series.*
Pat.	*Patna Supplement C. W. N.*
P. R.	*Punjab Record.*
P L. J.	*Patna Law Journal.*
P. L. W.	*Patna Law Weekly.*
P. L. R.	*Punjab Law Reporter.*
Q. B. D.	*Queen's Bench Division.*
R.	*I. L. R., Rangoon Series.*
S. L. R.	*Sindh Law Reports.*

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CHAPTER I.

INTRODUCTORY REMARKS.

The earliest conception of crime must have been that of disrespect to God or violation of His Commands and the earliest idea of punishment must have consisted of the pain to be inflicted by God in this world or in the next for some disobedience to His Commands. The earliest human punishment must have been that inflicted by the head of a family or by one person to another generally weaker than himself in revenge for some harm caused or some insult offered to him or for prevention of some harm apprehended by him in the future. Disabling punishments were resorted to most frequently in the earliest days. They partly answered the demand for revenge and retaliation and being sharp, strong and permanent, they better suited the rough and ready character of those times. The loss of an eye for an eye, of a tooth for a tooth, of a limb for a limb and even of blood for blood was rigorously exacted among the Hebrews and the Romans. By the ancient law of England he that maimed any man whereby the latter lost any part of his body was sentenced to lose the like part ; *Membro pro Membro* (IV Blackstone Com., 206). Manu ordained that with whatever limb a man of a low caste should hurt, that limb was to be cut off (Inst. VIII 279). It is specifically laid down that "he who raises his hand or a stick shall have his hand cut off, he who in anger kicks his foot shall have his foot cut off" and that "with whatever limb a thief in any way commits an offence against men, even of that the king shall deprive him in order to prevent a repetition of the crime" (Inst. 280, 312). In almost every country a thief had his right hand cut off and a ravisher was castrated. The penalty of death and mutilation in numberless forms were provided for the most trivial offences. Sometimes even mere constructive thoughts were punished capitally. Thus when Marsyas dreamt that he had cut Dionysius's throat the tyrant put him to death arguing that he would never have

dreamt of such a thing by night had he not thought of it by day. English law, till recently, was not behind any other system in the extreme severity of its punishments. Burning, drowning, beheading, starving to death were ordinary penalties for offences by no means extraordinary and inflicted throughout the middle ages on persons of both sexes. Mutilation—for a long period one of the commonest forms of punishment—was usually inflicted with most shocking cruelties. Limbs were hacked off ruthlessly, eyes plucked out, nose, ears and upper lip slashed off and scalp torn away. Men rendered cripples according to law were familiar objects in the highways and streets.

The same may be said of every other country in Europe. Death was a common punishment for *lèse majesté* which included a number of offences which would scarcely be classified together to-day. Blasphemy was linked with prevarication under this head and both were offences against Divine Majesty since for blasphemy Lucifer was thrust out of Heaven and for prevarication Adam was banished from paradise.

With the advance of the human race in intelligence and morality and in enlightenment and civilisation the criminal law has been steadily improving, subjectively and objectively, both as regards the character and extent of crimes and the nature and severity of punishment as also as regards the conditions of liability and the methods of enforcing it. The change was to a great extent due to the greater recognition of the true object and requirements of punishment and to the greater predominance of the relative theories of deterring and reformation—theories which distinguish modern Criminal Jurisprudence from the system of blind and indiscriminate severity, which they have happily helped to supersede, and which seemed to regard a criminal as a noxious excrescence on society to be ruthlessly extirpated, rather than as a diseased member to be rendered whole if possible. It came to be gradually admitted that it was a kind of quackery in government and argued a want of sound judgment to apply the same universal remedy, the ultimum supplicum to every case of crime and though it was much easier to extirpate than to amend mankind yet that magistrate must be deemed a weak and cruel surgeon who cut off every limb

which through ignorance or indolence he would not attempt to cure.

The tendency of all modern systems of legislation is to take the criminal's will into greater consideration and to try not only to prevent the criminal act but also to eradicate or reform the criminal will. It is now recognised that the State is not really an end in itself and that man is not here for the sake of the law or the State but that these rather exist for man. The only ground of punishment is the danger of the State and the basis and justification of punishment are not to be looked for in the equity or justice of that punishment but in its necessity and adequacy for the prevention of crime in the future. The intent of punishment says Baccaria is not to torment a sensible being, not to undo a crime already committed but to prevent further injury to society. Bentham and other jurists speak of the prevention of offences as the paramount end of punishment in comparison with which all other ends may be disregarded.

The prevention of crime, the object of punishment may be effected, (1) by deterring the offender and others from commiting the offence by awarding punishment to the offender which would be an example to others, (2) by reforming him so as to deprive him of the inclination to commit the offence.

Jurists differ as to the importance they attach to each of these modes, each one having found special favour at some period in some country and each being extolled at the expense of the other. Humanitarians resent the notion that punishment should ever be inflicted with a view to make a public example. Against its necessity it is alleged that the security of the State can be otherwise attained by education and other similar means. But no society with any sort of government could long exist without some rules for the repression of crime. No age, no nation, no country ever was or will be exempt from evil-doers and from individuals committing acts offensive to God and man. And were every human being allowed free scope in the indulgence of his passions and propensities, were there no restrictive rules in force against disturbing the peace of society or against aggression on individual rights there would be no peace and no rights at all. Traces of the existence of some

such rules are found even in the earliest societies of which there are any historical records. In advanced societies the rules existed in an elaborate form, the degree of elaborateness in different States generally varying with the degree of their respective advancement. Thus in the west the provisions relating to crimes contained in the Laws of Draco and in the Twelve Tables are known to every scholar. On the confines of the west and the east the Talmud containing full provisions for the punishment of most ordinary offences were of a still more ancient date. The oldest collection of the rules of criminal law is however that contained in a well developed condition in the Code of Manu. In the furthest east the systems ascribed to Li Knie and to Kao Tsu, the precursors of Ta Ching Lii Li may be traced to an equal if not a still greater antiquity to which must be ascribed the archaic though unique feature of that complex system of family relationship contained in them which vests a considerable power of punishment in the seniors over juniors and imposes on certain relations as such a vicarious liability to punishment.

Each of the two methods *viz.* deterring and reforming the criminal is open to practical objections and none can be adopted in any system of law singly and to the exclusion of others with much hope of success.

The effort of modern legislation is to combine as far as possible both the modes with a view to attain the greatest success in the prevention of crime, the combination appearing to be best adapted to secure that object.

The advocates of the theory of the criminal's reformation respect the human being in the criminal and refuse to use him merely as a means for the preservation of the State and therefore accept punishment for the crime not so much with a view to deter persons from its commission as to preserve the criminal from a repetition. They maintain that this end is more effectually attained by reform than by terror, because while violent punishments become familiar and are despised and habitual criminals are more common in countries where the severest penalties are inflicted, mild punishments avoid stirring

up hatred and the desire of revenge in the mind of the criminal and may easily tend to his reform.

If a criminal can be reformed it is so much gain to the State. The greater the number of good citizens and the less the number of criminals to be maintained in prisons the more the advantage to the State. Therefore it is expedient for the State to provide ways and means for the reformation of criminals. Apart from this, to prevent crime by reforming the criminal is a noble aim.

In Europe and America various humanitarian and philanthropic societies composed of highly cultured selfless men and women are constantly engaged in this sort of nation-building work.

But for long it was neglected. In England, two centuries ago, John Howard the philanthropist made it a mission of his life to do away with the barbarous treatment of convicts in prison, and prepared public opinion for the humane treatment of criminals. The movement started by this great man followed the change in the angle of vision with regard to the administration of criminal law in which a spirit of revenge and retaliation was the dominating element at the time and persons convicted of crimes came to be regarded no longer as wild animals fit only to be hunted down, tortured and kept in confinement, under conditions which are a disgrace to civilisation but as human beings fit to be treated with consideration. The task that Howard and his generation of reformers set before them was chiefly to remedy great positive abuses. The still more magnificent conception of the reformation of criminals which has been so successfully developed in England must be associated with a band of reformers amongst whom is numbered a great ornament of the bar and the judicial bench, Sir William Blackstone, who was a pioneer in the efforts for the reclamation of the criminal. The success with which the reformation of criminals was pursued in Holland gave rise to an Act (19 Geo. 3 C 74) for the creation of penitentiaries in England which was carried in 1779 chiefly by the influence of Blackstone. There was however much delay in carrying it out although Pitt clearly saw and stated the importance of discriminating between the different kinds and degrees of criminal character and averting the conta-

gion of vice produced by the existing prison system. It was not till some years after the death of Howard that English philanthropy made the reclamation of criminals one of its great objects. The English Judiciary was however far from indifferent to the state of prisons and sufferings of the prisoners. Indeed many Judges were killed by Jail fever when attending assizes. In 1750 the disease raged to such an extent at New Gate that at the Old Bailey Assizes three Judges were its victims. From that time sweet smelling herbs were always placed in the prisoner's dock to counteract the contagion. When Oglethorpe in 1729, three years after the birth of Howard, succeeded in obtaining a parliamentary inquiry into the condition of the Fleet and Marshalsea it was stated in evidence that when Lord King was Chief Justice of the Common pleas, an office which he held from 1714 to 1725, a complaint had been preferred to him from prisoners in the Fleet that they were immured in close and unwholesome confinement within the prison walls. The warder urged in answer to this that from the insecurity of the prison there would be continual danger of the prisoners escaping if they were allowed to exercise. "Then" said the Chief Justice "you may raise the walls higher but there shall be no prison within a prison."

Now as the result of the humane and persistent efforts of many devoted men and women there is, on the whole, in England a decided decline in criminality. The prisons there contain about only half the number of men they used to contain in spite of the growth of the population The system of putting most first offenders and some other suitable cases upon probation is bearing fruit both economically and morally. Borstal institutions may not have accomplished all that was prophesied for them but on the whole they have been a success. If such institutions had never existed, and all the young people of both sexes who have been sent to them had been sent to prison in the old way, how many confirmed jail birds and criminals would have been manufactured and periodically turned loose upon society to say nothing of the cost of their maintenance in prison!

Juvenile offenders require special care and attention and

no social development of recent years is fraught with more potential value than the efforts which are being made throughout the world of civilisation to stem the tide of juvenile and adolescent delinquency at the source. The key note of the International Prison Congress held in London early in August 1925, was the prevention of crime rather than the punishment of the offender and many of the departments of Child-Welfare work in the United States, in Europe and the Dominions and more recently in the South American States, both directly and indirectly have this aim in view.

In the first Code of Criminal Procedure that was passed in this country in 1861 provision was made for the detention of a youthful offender in a reformatory established by Government in which there were means of suitable discipline and of training in some branch of useful industry or which was kept by a person willing to obey such rules as Government might prescribe. This provision of law has all along found a place in the successive Codes and it is contained in Section 399 of the present Code of Criminal Procedure.

In 1876 the first Reformatory Schools Act was passed and in 1897 it was replaced by a new Act. The provisions of sec. 399 of the Code of Criminal Procedure are applicable only in places where the Reformatory Schools Act does not apply. Under this Act a youthful offender, meaning a boy under fifteen years of age, can be detained for three to seven years in a Reformatory school established by government or kept by a person willing to act in conformity with the rules prescribed by Government in this behalf. Every such school must provide sufficient means of giving the youthful offenders industrial training, of separating the inmates at night, proper sanitary arrangements, water supply, food, clothing and bedding for the youthful offenders detained therein, and an infirmary or proper place for the reception of such youthful offenders when sick. This detention may be ordered by courts in lieu of imprisonment or transportation to which a youthful offender may be sentenced on conviction for an offence. The object of the Act is to give industrial training to youthful offenders (boys only) so that they may earn their living honestly and pass the

rest of their lives as good citizens. The Act also provides for both boys and girls under the age of fifteen being admonished and discharged instead of being punished or detained in a reformatory school.

Provincial legislatures have passed measures best suited to local conditions with a view to make adequate provision for juvenile offenders. In Bengal for example the Reformatory Schools Act has been substituted by the Children Act (II B.C of 1922).

The Act which is a very progressive piece of legislation provides for the protection of children and young persons and for special treatment of youthful offenders. It puts a restriction on punishment of children and young persons by enacting that, notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment or committed to prison in default of payment of a fine or in default of furnishing security. The only circumstance under which a young person may be sentenced to imprisonment or committed to prison is when the court certifies that he is of so unruly or so depraved a character that he is not a fit person to be sent to a reformatory school and that none of the other methods in which the case may be dealt with is suitable. (Sec. 21).

The Act removes in the case of children and young persons the disqualification attaching to convictions of offences by enacting that, notwithstanding anything contained in any other law, the conviction of a child or young person shall not be regarded as a disqualification attached to a conviction of an offence under such law.

The Local Government is authorised to establish and maintain reformatories and industrial schools for the reception of youthful offenders and children convicted of offences, as also to certify reformatories and industrial schools kept by private persons as fit for the reception of such youthful offenders and children.

The Act provides for offenders between twelve and sixteen years of age, on conviction for an offence punishable with transportation or imprisonment, as also young persons ordered to give

security under Sec. 106 or Sec. 118 Cr. P. C. but who have failed to furnish the security, being sent to a reformatory or industrial school to be detained there, in case of a youthful offender sent to a reformatory school for not less than two and not more than five years and not in any case after he attains the age of eighteen years, and in the case of a child sent to an industrial school for such time as to the court may seem proper for the teaching and training of the child but not in any case extending beyond the time when the child will attain the age of sixteen years.

The court is also empowered to discharge a youthful offender after due admonition only or to commit him to suitable custody.

The Act provides for the trial of children and young persons in special courts.

For the children of members of a tribe registered under the Criminal Tribes Act the Local Government may establish under that Act industrial, agricultural or reformatory schools and may order them to be separated and removed from their parents or guardians and to be placed in any such school. For this purpose all persons under the age of eighteen and above the age of six years are "children." (Sec. 17 Criminal Tribes Act VI of 1924).

Notwithstanding these provisions the work of reforming juvenile offenders has made no satisfactory progress in this country and India under British administration should not lag, as it has done, behind other civilised countries in this direction. It may not be possible to have institutions like those which exist in England at once in this country but great oaks from little acorns grow and a beginning should be made in a fitting manner.

Next to juvenile offenders come the first offenders. In England the First Offenders Act of 1887 is an important piece of legislation and of still greater importance is the Probation of Offenders Act of 1907. These two statutes have been worked with the greatest advantage to the State. The work of the church in taking charge of convicted persons with a view to reclaiming them is angelic. In a London Police Court, in case after case, persons come up charged with offences

and with hardly a word said in public which can add to the sense of shame of the accused, he or she is, after a consultation with the Magistrate and the missionary, bound over or discharged on probation. The prisoner leaves the dock, the missionary accompanying him, and the result happily is that that the prisoner is rarely seen in the dock again. This method, the beneficence of which is now universally recognised, of dealing with prisoners likely to be influenced for good by wise and kindly advice and assistance owes its inception to the appointment, fifty years ago, by the Church of England Temperance Society, of a missionary to attend the sittings of the Police Courts. For thirty years thereafter, the police court missionary was not officially recognised though in practice offenders released under the First Offenders Act were advised and assisted by the missionary with full knowledge and approval of the Magistrate who would not indeed in many cases have felt justified in binding an offender over unless he had known that the good offices of the missionary would be employed to assist the reformation of the prisoner. Under the Probation of Offenders Act of 1907 the missionary who was in the vast majority of cases the probation officer appointed thereunder found his duties not only officially recognised but largely increased and the Criminal Justice Act of 1925 set the final seal of legislative approval on the efforts of missionaries and probation officers by providing for the establishment of probation areas throughout the country, for the appointment of probation officers for every such area and for the payment to such officers of salaries and superannuation allowances.

The wisdom and foresight of those who half a century ago appointed the first police court missionary has resulted in the establishment over the whole country of a system which is and will continue to be of incalculable benefit to the community. In this country the provisions of the English First Offenders Act were introduced in the Code of Criminal Procedure in 1898 (Sec. 562), by Sir M. D. Chalmers, the then Law-member of the Viceroy's Council, in pursuance of suggestions made from influential quarters, but no organised effort has been made so far in this country either by the public or the magistracy for the

reclamation of persons who if not cared for may degenerate into criminals.

Under Sec. 562 as enacted in the Code of 1898 an order of release on probation of good conduct could in the discretion of the court be made in any case in which the conviction was for theft, theft in a building, dishonest misappropriation or cheating or any other offence under the Indian Penal Code punishable with not more than imprisonment for two years and no previous conviction was proved. In taking action under the section the court was to take into consideration the youth, character and antecedents of the offender, the trivial nature of the offence and any extenuating circumstances under which the offence was committed.

This was the law for the release of convicted offenders on probation for about quarter of a century and instances of the application of the law were few and far between. In 1923 when the Code of Criminal Procedure was overhauled the scope of this provision of law was considerably enlarged so as to make an order of release on probation permissible when any person under twentyone years of age or any woman is convicted of an offence not punishable with death or transportation for life and no previous conviction is proved and in cases where the accused is not under twenty-one years of age if the conviction is for an offence punishable with imprisonment for not more than seven years. In all cases the court is to take action if in its opinion an order of release on probation of good conduct is expedient regard being had to the age, character or antecedents of the offender and to the circumstances in which the offence was committed. The accused is to execute a bond which may be with or without sureties in the discretion of the court to appear and receive sentence when called upon during such period as the court may direct and in the meantime to keep the peace and be of good behaviour. The maximum period for which such bond may be taken is three years. Formerly it was one year and with the scope of the section enlarged so as to make it applicable to more serious cases than before, the period of the bond has also been increased.

The change in the law as stated above was effected by Act XVIII of 1923 but the matter was taken up again the same year and by Act XXXVII of 1923 a further provision has been added for the release of first offenders with admonition on conviction in cases in which, generally speaking, an order of release on probation of good conduct could be made under the Code of 1898.

This provision for release with admonition is applicable to accused persons of all ages provided they are first offenders whereas the similar provision in the Reformatory schools Act may be utilised for the benefit of youthful offenders under the age of fifteen and that in the Bengal Children Act for the benefit of youthful offenders under the age of sixteen.

With a view to keep a check on the movements of persons who after being convicted of certain offences are again convicted of those offences the Code provides in Sec. 565 that the court at the time of passing sentence of transportation or imprisonment on any such person may order that his residence and any change of or absence from such residence after release should be notified for a time not exceeding five years from the date of the expiration of the sentence.

Besides the provisions in the Code of Criminal Procedure for restricting the liberty of a person likely to commit an offence the Criminal Tribes Act (VI of 1924) provides for the registration, surveillance and control of criminal tribes. Under Sec. 3 of the Act if the Local Government has reason to believe that any tribe, gang or class of persons or any part of a tribe, gang or class is addicted to the systematic commission of non-bailable offences it may by notification in the local official gazette declare that such tribe, gang or class or, as the case may be, that such part of the tribe, gang or class is a criminal tribe for the purposes of this Act. Under Sec. 4 of the Act the Local Government may direct the District Magistrate or the Commissioner of Police in the Presidency Towns or in the town of Rangoon to make or cause to be made a register of the members of any Criminal Tribe or part of a Criminal Tribe within the local limits of his jurisdiction. Sec. 9 of the Act gives power to the District Magistrate or Commis-

sioner of Police, as the case may be, to order at any time the finger impressions of any registered member of a Criminal Tribe to be taken.

The Local Government may order members of criminal tribes to report themselves at fixed intervals and notify their place of residence and any change or intended change or intended absence from residence (Sec. 10).

The Local Government may also restrict the movements of the members of a Criminal Tribe to a specified area or settle them in particular places of residence (Sec. 11).

The Local Government may establish industrial, agricultural or reformatory settlements and may order to be placed in any such settlement any Criminal Tribe or any part or member of a Criminal Tribe. (Sec. 16).

The provisions in the Reformatory Schools Act and in the Code of Criminal Procedure (Secs. 399, 562, 565) are intended to be preventive measures taken by courts on conviction for offences in special cases contemplated by those sections. Sec. 106 of the Code provides that any person convicted of an offence against public tranquillity with certain exceptions or of assault or other offence involving a breach of the peace or criminal intimidation may be required to execute a bond with or without sureties, as the court may decide, for keeping the peace for such period, not exceeding three years as the court may think fit to fix.

Besides these preventive measures to be taken on conviction the Code provides (Sec. 466) for the release of an accused person, pending investigation or trial, who is found to be of unsound mind and incapable of making his defence, on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person and for his appearance when required before the court or an officer appointed by it. If the case is one in which in the opinion of the court bail should not be taken or if sufficient security is not given the court is to order the accused to be detained in safe custody in such place and manner as it thinks fit.

The Code provides for preventive measures being taken

otherwise than on conviction and apart from a pending prosecution as in the case of a lunatic accused.

Such preventive measures put a restraint on a person who is likely to commit an offence. This restraint of liberty is in a sense punishment and is inflicted for the purpose of prevention of crime before a crime is committed as a punishment of imprisonment or fine is inflicted for the same purpose after a crime is committed. Prevention of crime is the justification for both but as the former is inflicted before a crime is committed the greatest care and caution should be taken before inflicting it. The power of the State to inflict this sort of punishment is undoubted but it is the bounden duty of the State to see that there is no abuse of the process of law which is intended to provide for this sort of punishment.

The provisions in the Code relating to this subject are Secs. 107, 108, 109, 110 dealing with security for keeping the peace in one case and for good behaviour in the three others.

The security for keeping the peace may be taken for one year in the maximum under Sec. 107 and that of good behaviour for a like period in the maximum under Secs. 108, 109 and for three years in the maximum under Sec. 110.

Sec. 107 is intended to prevent a breach of the peace or disturbance of the public tranquillity.

Sec. 108 is intended to prevent dissemination of seditious matter or any matter likely to promote enmity between classes or which may be criminal intimidation or defamation of a judge by persons who have already committed such acts.

Sec. 109 is intended to prevent commission of crime by persons who are habitual offenders and desperate and dangerous characters.

Besides these provisions the Code provides for preventive measures being taken by Magistrates in respect of public nuisances, in urgent cases of nuisance or apprehended danger and for settlement of disputes relating to immoveable property.

Secs. 133, 143, 144 and 145 of the Code deal with such preventive measures.

The object of Sec. 133 which deals with the removal of a public nuisance is intended to prevent the commission of an

offence which is likely to take place if a nuisance of a nature contemplated in the section remains unabated.

Sec. 143 is intended to secure the prevention of an offence by prohibiting the repitition or continuance of a public nuisance.

Sec. 144 is intended to prevent a breach of the peace in urgent cases of nuisance or apprehended danger.

Sec. 145 is intended to prevent a breach of the peace in a case of dispute relating to possession of immoveable property which is always a fruitful source of breaches of the peace.

Of these, sections 133 and 145 have no application in a Presidency Town and Presidency Magistrate have no power to take action under these sections.

In addition to the foregoing provisions the Code gives Magistrates and officers in charge of police stations power to disperse unlawful assemblies. These powers are given under Secs. 127, 128.

Sec. 127 authorises a Magistrate or officer in charge of a police station to command an unlawful assembly to disperse.

Sec. 128 authorises a Magistrate or officer in charge of a police station to disperse an unlawful assembly by civil force where it does not disperse on being commanded to do so.

Besides these provisions for dispersing unlawful assemblies by civil force the Code provides for dispersing such assemblies by military force.

Sec. 129 authorises a Magistrate to disperse an unlawful assembly by military force when such assembly cannot be otherwise dispersed. Sec. 130 casts a duty on an officer commanding troops to disperse such assembly on the requisition of a Magistrate.

In addition to the power given to Magistrates and officers in charge of police stations to disperse unlawful assemblies the Code provides for the dispersing of unlawful assemblies by a commissioned military officer on his own initiative.

Sec. 131 authorises any commissioned officer of his Majesty's Army to disperse an unlawful assembly by military force when the public security is manifestly endangered by an unlawful assembly and no Magistrate can be communicated with.

Over and above the provisions aforesaid the Code provides for preventive action being taken by the police generally.

Sec. 55 of the Code authorises an officer in charge of a police station to arrest or cause to be arrested vagabonds and habitual offenders without an order from a Magistrate and without a warrant.

Under Sec. 149 every police officer may interpose for the purpose of preventing and shall to the best of his ability prevent the commission of any cognizable offence.

Under Sec. 150 every police officer is bound to give any information he may receive of a design to commit a cognizable offence to the police officer to whom he is subordinate and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Under Sec. 151 a police officer may arrest without warrant from a Magistrate any person designing to commit a cognizable offence if it appears to him that the commission of the offence cannot be otherwise prevented.

Under Sec. 152 a police officer may interpose to prevent an injury to pubilc property.

Under Sec. 153 an officer in charge of a police station may without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures. The provisions of the Code of Criminal Procedure are applicable to the police in Calcutta and Bombay only when they are expressly made applicable to them (Sub Sec. 2 of the Code). That being so Sec. 149 and Secs. 150 to 153 of the Code which give a police officer power in relation to a cognizable offence are not applicable to the police in Calcutta and Bombay who are governed by special Acts which contain substitutes for these provisions. Sec. 55 of the Code is however applicable to the police alike in Calcutta and the Muffassil. Section 127 applies both to the police in Calcutta and the Muffassil and Sec. 128 to the police in all Presidency towns and the Muffassil. The whole of Chap. IX of the Code which contains the provisions for dealing with unlawful assemblies, so far as it could apply to the city of Bombay, has been repealed by the City of Bombay Police Act

(IV of 1902) and therefore so far as the City of Bombay is concerned it is governed by its local law in the matter of dispersing unlawful assemblies.

Secs. 42, 44 and 45 of the Code cast an obligation on every citizen to do certain things for the prevention of offences.

Coming to provincial legislation in relation to prevention of offences the Calcutta Suppression of Immoral Traffic Act (XIII B. C. of 1923) gives power to the Commissioner of police of Calcutta to take steps for the suppression of brothels and of traffic in women and girls and for purposes of a like nature in the town and suburbs of Calcutta and in the Port of Calcutta.

The Goondas Act (1 B.C. of 1923) provides for the control of hooligans or goondas residing in or frequenting Calcutta or the neighbourhood thereof and for their removal elsewhere. The Commissioner of Police in Calcutta and the District Magistrate in any local area which is outside Calcutta but is included in the neighbourhood of Calcutta is authorised to take the initiative in the shape of a report to the Local Government which on the recommendation of two advising Judges is empowered to pass final orders for the removal of the person proceeded against, from Bengal if he is a non-Bengali and from Calcutta and its neighbourhood if a Bengali.

The communal riots which broke out in Calcutta in 1926 made it necessary to invest the Commissioner of Police with power to deal with turbulent characters without the necessity of previous orders from the Local Government, and the holding of an enquiry by advising Judges as laid down in the Goondas Act, during any period when a state of emergency is declared by the Local Government. The Presidency Area (Emergency) Security Act (III B. C. of 1926) is intended to provide for the safeguarding of life and property in the presidency area.

The Bengal Criminal Law Amendment Act of 1925 which supplements the ordinary criminal law in Bengal and which the local legislative council refused to pass but which was placed on the statute book by the Governor of Bengal under the provisions of Sec. 72 E. of the Government of India Act and

which received the assent of His Majesty gives power to the Local Government to deal with suspects (against whom in the opinion of the Local Government there are reasonable grounds for believing that they have committed or are committing or are about to commit certain offences) in a particular manner and by order in writing to give all or any of the following directions namely, that such a person shall notify his residence and any change of residence to such authority as may be specified in the order, shall report himself to the police in such manner and at such periods as may be specified, shall conduct himself in such manner or abstain from such acts as may be specified, shall reside or remain in any area so specified, shall not enter, reside in or remain in any area so specified or shall be committed to custody in jail. (Sec. 11).

The powers assumed by the executive under the Act to arrest a citizen and commit him to custody in jail or to restrict his movements otherwise and keep him under surveillance are very drastic. The enactment is indeed one which ought not to find a place in the statute book under ordinary circumstances but the object of making an order under section 11 of the Act is to prevent the commission of offences and it is this which can be pleaded as the only justification for passing the Act.

CHAPTER II.

THE CODE OF CRIMINAL PROCEDURE AS APPLICABLE TO PREVENTION OF OFFENCES.

(Italics indicate recent amendments).

Preliminary

Sec. (2) It (the Code of Criminal Procedure) extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

(*a*) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the Police in the towns of Calcutta and Bombay;

(*b*) heads of villages in the Presidency of Fort St. George; or

(*c*) village police-officers in the Presidency of Bombay:

Provided that the Local Government may, if it thinks fit, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

Definitions.

Definitions.

4.(*1*) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

Commissioner of Police.

(*g*) "Commissioner of Police" includes a Deputy Commissioner of Police :

High Court.

(*j*) "High Court" means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and *Rangoon, and the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind:* in other cases. "High Court" means the highest Court of criminal appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf.

Inquiry.

(*k*) "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court :

Investigation.

(*l*) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any

person (other than a Magistrate) who is authorized by a Magistrate in this behalf :

(*m*) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath :

Judicial proceeding.

(*p*) "officer in charge of a police-station" includes, when the officer in charge of the police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police-officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police-officer so present :

Officer in charge of a police station.

(*r*) "pleader," used with reference to any proceeding in any Court, means a pleader authorized under any law for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding :

Pleader.

(*s*) "police-station" means any post or place declared, generally or specially, by the Local Government to be a police-station, and includes any local area specified by the Local Government in this behalf.

Police-station.

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(*t*) "Public Prosecutor" means any person appointed under S. 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction :

Public Prosecutor.

I.

Preventive Measures taken by Courts on Conviction for an Offence.

A. Security for keeping the peace on conviction.

Security for keeping the peace on conviction.

106. (*1*) Whenever any person accused of *any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of* assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court, *including a Court hearing appeals under section 407*, or by the High Court when exercising its powers of revision.

Procedure when Magistrate cannot pass sentence sufficiently severe.

[**349.** (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) *When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.*

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law:

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.]

B. Youthful Offenders, Special Provision Relating to

Confinement of youthful offenders in reformatories.

399. (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

C. First Offenders, Special Provision Relating to

Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment.

562. (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good*

conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Conviction and release with admonition.

(1A) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment, and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(2) An order under this section may be made by

any Appellate Court or by the High Court when exercising its power of revision.

(3) *When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:*

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) *The provisions of sections 122, 126A and 406A shall, so far as may be apply in the case of sureties offered in pursuance of the provisions of this section.*

Procedure in cases submitted by Magistrate not empowered to act under section 562.

[**380.** Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.]

Provision in case of offender failing to observe conditions of his recognizance.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

Conditions as to abode of offender.

564. (1) The Court, before directing the release of an offender under S. 562, shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in Sections 562 and 563 shall affect the provisions of S. 31 of the Reformatory Schools Act, 1897.

D. Previously Convicted Offenders—Special Provision Relating to

Order for notifying address of previously convicted offender.

565. (1) *When any person having been convicted—*

(*a*) *by a Court in British India of an offence punishable under S. 215, S. 489A, S. 489B, S. 489C, or S. 489D, of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or*

(*b*) *by a Court or Tribunal in the territories of any Prince or State in India acting under*

the general or special authority of the Governor-General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) *If such conviction is set aside on appeal or otherwise, such order shall become void.*

(3) *The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.*

(4) *An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.*

(5) *Any person against whom an order has been*

made under this section and who refuses or neglects to comply with any rule so made, shall be deemed, within the meaning of section 176 of the Indian Penal Code, to have omitted to give a notice required for the purpose of preventing the commission of an offence.

(6) *Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.*

II.

Preventive measure taken by Courts in releasing Lunatic charged with the commission of an offence.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *whether the case is one in which bail may be taken or not* may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) *If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Local Government:*

Provided that no order for the detention of the

accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

III.

Preventive measures taken by courts otherwise than on conviction for an offence.

Security for keeping the Peace.

107. (*1*) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate, *if in his opinion there is sufficient ground for proceeding,* may, in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(*2*) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

Procedure of Magistrate not empowered to act under sub-S. (1).

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reason, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under *Sub-Section* (3) may in his discretion detain such person in custody *pending further action by himself under this chapter.*

Security for good behaviour.

(1) *Security for good behaviour from persons disseminating seditious matter, &c.*

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits either orally or in writing, *or in any other manner intentionally* disseminates or attempts to disseminate, or in any wise abets the dissemination of,—

(*a*) any seditious matter, that is to say, any matter the publication of which is punish-

able under S. 124A of the Indian Penal Code, or

(*b*) any matter the publication of which is punishable under Section 153A of the Indian Penal Code, or

(*c*) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate *if in his opinion there is sufficient ground for proceeding may* (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under *and edited, printed and published* in conformity with, the rules laid down in the Press and Registration of Books Act, 1867, *with reference to any matter contained in such publication* except by the order or under the authority of the Governor-General in Council or the Local Government or some officer empowered by the Governor-General in Council in this behalf.

(2) *Security for good behaviour from vagrants and suspected persons.*

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local

limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

(3) *Security for good behaviour from habitual offenders and desperate and dangerous characters.*

110. Whenever a Presidency Magistrate, District Magistrate or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

(*a*) is by habit a robber, house-breaker, thief, *or forger, or*

(*b*) is by habit a receiver of stolen property knowing the same to have been stolen, or

(*c*) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(*d*) *habitually commits, or attempts to commit, abets the commission of the offence of*

kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code or under S. 489 A, S. 489 B., S. 489 C or S. 489 D of that Code, or

(*e*) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(*f*) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

111. Repealed by Act XII of 1923 Sec. 8.

The Section ran as follows—The provisions of Sections 109 and 110 do not apply to European British Subjects in cases where they may be dealt with under the European Vagrancy Act, 1874.

General provisions relating to security proceedings taken otherwise than on conviction.

Order to be made.

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and

the number, character and class of sureties (if any) required.

Procedure in respect of person present in Court.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Power to take bond for appearance.

[**91.** When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

Arrest on breach of bond for appearance.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.]

Summons or warrant in case of person not so present.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody a warrant directing the officer in whose custody he is, to bring him before the Court :

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

[76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

Court may direct security to be taken.

(2) The endorsement shall state—

(a) the number of sureties ;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound ; and

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

Recognizance to be forwarded.

81. The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Person arrested to be brought before Court without delay.

Bail.

496. When any person, other than a person accused of a non-bailable offence, is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court and is prepared at any time, while in the custody of such officer or at any stage of the proceedings before such Court, to give bail, such person shall be released on bail : Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from

In what cases bail to be taken.

such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

Power to direct admission to bail or reduction of bail.

498. The amount of every bond executed under this Chapter [Chap. 39 On Bail] shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

Copy or order under Sec. 112 to accompany summons or warrant.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

Power to dispense with personal attendance.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

The Enquiry.

Inquiry as to truth of information.

117. (1) When an order under S. 112 has been read or explained under S. 113 to a person present in Court, or when any person appears or is brought before a

Magistrate in compliance with, or in execution of, a summons or warrant issued under Sec. 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.*

(3) *Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded :*

Provided that—

(*a*) *no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to*

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*For procedure of enquiry. See Schedule 1, page 91.

execute a bond for maintaining good behaviour, and

(*b*) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is a habitual offender *or is so desperate and dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Right of person proceeded against to be defended and his competency to be a witness.

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

[**340.** (1) *Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.*

(2) *Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.*

N.B.—For definition of "pleader" see section 4 (*r*) page 21.]

The final order.

118. (*1*) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Order to give security.

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under S. 112 :

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

119. If on enquiry under Sec. 117 it is not proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be, that the person in respect of whom the enquiry is made should execute a bond the Magistrate shall make an entry on the record to that effect and if such person is in custody only for the purposes of the enquiry shall release him or if such person is not in custody shall discharge him.

Deposit of money or Government security instead of recognizance.

[**513.** When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.]

Bond required from minor.

[**514B.** *When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.*

(This is a general provision relating to bonds, Clause 3, of the proviso to sec. 118 is the special provision relating to security cases).]

Order under Sec. 118—a Judgment.

[**367.** (1) Every such judgment [*i.e.*, judgment in every trial in any Criminal Court of original jurisdiction], shall except as otherwise expressly provided by this Code, be written by the presiding officer of the Court *or from the dictation of such presiding officer* in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him.*

Language of Judgment. Contents of judgment.

(6) *For the purposes of this section, an order under S.* 118 *or S.* 123, *sub-section* (3), *shall be deemed to be a judgment.*]

Every order under Sec. 118 appealable.

Appeal from order requiring security for keeping the peace or for good behaviour.

[**406.** *Any person who has been ordered under S.* 118 *to give security for keeping the peace or for good behaviour may appeal against such order—*

(a) If made by a Presidency Magistrate, to the High Court;

(b) If made by any other Magistrate, to the Court of Session:

Provided that the local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) *or sub-section* (3*A*) *of S.* 123.

N.B.—For powers of appellate Courts and general provision relating thereto see secs. 423, 424, 428, 429, 430, page 75.]

Proceedings in all cases subsequent to order to furnish Security

Commencement of period for which security is required.

120. (1) If any person, in respect of whom an order requiring security is made under S. 106 or S. 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on

the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

Contents of bond.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Power to reject sureties.

Power to reject sureties.

122. (1) *A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond:*

Provided that before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) *Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.*

(3) *If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:*

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Appeal from order refusing to accept or rejecting a surety.

[**406A.** *Any person aggrieved by an order refusing to accept or rejecting a surety under S. 122 may appeal against such order:—*

(a) if made by a Presidency Magistrate, to the High Court;

(b) if made by the District Magistrate, to the Court of Session; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

N.B.—For powers of appellate Courts and general provisions relating thereto see secs. 423, 424, 428, 429, 430, page 75.]

Imprisonment in default of security.

123. (*1*) If any person ordered to give security under S. 106 or S. 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

Proceedings when to be laid before High Court or Court of Session.

(*2*) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the

orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit :

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

Order under sec. 123—a Judgment.

[**367.** (1) Every such judgment [*i.e.*, in every trial in any Criminal Court of original jurisdiction] shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court *or from the dictation of such presiding officer* in the language of the Court, or in English ; and shall contain the point or points for determination, the decision thereon and the reasons for the decision ; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and, where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

(6) *For the purposes of this section, an order under section 118 or section 123, sub-section* (3), *shall be deemed to be a judgment.*]

(3*A*) *If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section* (2), *such reference shall also include the case of any other of such persons who has been ordered to give*

security, and the provisions of sub-sections (2) and (3) shall in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.

(*3B*) A Sessions Judge may in his discretion trans*fer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.*

(*4*) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(*5*) Imprisonment for failure to give security for keeping the peace shall be simple.

Kind of Imprisonment.

(*6*) Imprisonment for failure to give security for good behaviour *shall, where the proceedings have been taken under section 108 be simple and where the proceedings have been taken under section 109 or 110,* be rigorous or simple as the Court or Magistrate in each case directs.

[*Sec. 397 proviso. Provided, further, that where a person who has been sentenced to imprisonment by an order under S. 123 in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.*]

Special powers of District and Chief Presidency Magistrates.

Power to release persons imprisoned for failing to give security.

124. (*1*) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter, may be released without hazard to the community or to any other person, he may order such person to be discharged.

(*2*) Whenever any person has been imprisoned for failing to give security under this Chapter (Chap. VIII), the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(*3*) *An order under sub-section* (*1*) *may direct the discharge of such person either without conditions or upon any conditions which such person accepts* :

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(*4*) *The Local Government may prescribe the conditions upon which a conditional discharge may be made.*

(*5*) *If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.*

(*6*) *When a conditional order of discharge has been cancelled under sub-section* (*5*), *such person may be*

arrested by any police-officer without warrant, and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release) the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of S. 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.

125. The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

District Magistrate.

[*Sec. 7, Sub-Sec.* (4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

Sec. 10. (1) In every district outside the presidency-towns the Local Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate, and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code *or under any other law for the time being in force* as the Local Government may direct.

(3) *For the purpose of sections 192, sub-section (1), 407, sub-section (2), and 528, sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.*

Sec. 18, Sub-Sec. (4) The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.]

Discharge of sureties.

Discharge of sureties.

126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

126A. *When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3) of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such*

person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

Forfeiture of Bond.

Procedure on forfeiture of bond.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it: and it shall authorize the *attachment* and sale of any movable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so

bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) *When any person who has furnished security under section* 106 *or section* 118 *or section* 562 *is convicted of an offence the commission of which constitutes a breach of the conditions of his bond or of a bond executed in lieu of his bond under section* 514*B*, *a certified copy of the Judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.*

Procedure in case of insolvency or death of surety or when a bond is forfeited.

514A. *When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of S.* 514, *the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.*

515. All orders passed under S. 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

Appeal from and revision of, orders under S. 514.

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances.

IV.

Preventive measures by Magistrates, the Police and the Military in connection with unlawful assemblies.

Chapter IX of the Code of Criminal procedure.

N.B.—The whole of this chapter of the Code of Criminal Procedure so far as it applies to the city of Bombay is repealed by the City of Bombay Police Act (Bom. Act IV of 1902).

127. (*1*) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Assembly to disperse on command of Magistrate or police officer.

(*2*) This section applies also to the police in the town of Calcutta.

128. If, upon being so commanded, any such assembly does not disperse, or if without being so commanded, it conducts itself in such a manner as to show a determina-

Use of civil force to disperse.

tion not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Magisty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Use of military force.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

Duty of officer commanding troops required by Magistrate to disperse assembly.

130. (*1*) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(*2*) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if while he is acting under this section it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

Power of commissioned military officers to disperse assembly.

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Local Government, and—

Protection against prosecution for acts done under this Chapter.

(*a*) no Magistrate or police-officer acting under this Chapter in good faith,

(*b*) no officer acting under S. 131 in good faith,

(*c*) no person doing any act in good faith, in compliance with a requisition under S. 128 or S. 130 and,

(*d*) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence:

Provided that no such prosecution shall be instituted in any Criminal Court against any Officer or soldier in his Majesty's army except with the sanction of the Governor-General in Council.

V.

Preventive measures by Magistrates in connection with Public nuisances.

Chapter X of the Code, Public nuisances.

Conditional order for removal of nuisance.

133. *Whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit,*

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be, or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A 'public place' includes also pro-

perty belonging to the State, camping grounds and grounds left unoccupied for sanitary *or* recreative purposes.

Service or notification of order.

134. (*1*) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons.

Person to whom order is addressed to obey or show cause or claim jury.

135. The person against whom such order is made shall—

(*a*) perform, within the time *and in the manner* specified in the order, the act directed thereby; or

(*b*) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

Consequence of his failing to do so.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute.

Procedure where he appears to show cause.

137. (*1*) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-cause.

(*2*) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(*3*) If the Magistrate is not so satisfied, the order shall be made absolute.

N.B.—Procedure for summons cases. See sections 242, 243, 244, Schedule 1, page 91.

138. (*1*) On receiving an application under section 135 to appoint a jury, the Magistrate shall—

Procedure where he claims jury.

(*a*) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(*c*) fix a time within which they are to return their verdict.

(*2*) The time so fixed may, for good cause shown, be extended by the Magistrate.

139. (*1*) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

(*2*) In other cases no further proceedings shall be taken under this Chapter.

139A. (*1*) *Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river,*

Sec. 139A. *Procedure where existence of public right is denied.*

channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter.

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require.*

(3) *A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138.*

Procedure on order being made absolute.

140. (1) When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by S. 140.

Procedure on failure to appoint jury or omission to return verdict.

142. (*1*) If a Magistrate making an order under S. 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been, appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

Injunction pending inquiry.

(*2*) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(*3*) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

143. A District Magistrate or Sub-divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance.

VI.

Preventive measures by Magistrates in urgent cases of nuisance or apprehended danger.

Chapter XI of the Code. Temporary Orders in urgent cases of Nuisance or apprehended danger.

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

144. (*1*) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-divisional Magistrate, or of any other Magistrate, (*not being a Magistrate of the third class*), specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section, and* immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(*2*) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be passed *ex parte*.

(3) An order under this section may be directed to

a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may *either on his own motion or on the application of any person aggrieved* rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and shewing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.*

(6) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

VII.

Preventive measures by Magistrates in cases at dispute relating to immovable property.

Chapter XII of the Code. Disputes as to Immovable Property.

Procedure where dispute concerning land, etc., is likely to cause breach of peace.

145. (1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in

writing stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A Copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, *receive all such evidence as may be* produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the

subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

Party in possession to retain possession until legally evicted.

(6) If the Magistrate decides that one of the parties was *or should under the first proviso to sub-section* (4) *be treated as being in* such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction, *and when he proceeds under the first proviso to sub-section* (4) *may restore to possession the party forcibly and wrongfully dispossessed.*

(7) *When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto; and*

(8) *If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him,*

is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) *The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing,*

(10) *Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.*

Power to attach subject of disputes.

146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof :

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, *and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court,* appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all

the powers of a receiver appointed under the Code of Civil Procedure :

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged.

Disputes concerning rights of use of immoveable property, etc.

147. (1) *Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied, from a police-report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in S.* 145, *sub-S.* (2) (*whether such right be claimed as an easement or otherwise*), *within the local limits of his jurisdiction he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate, and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in S.* 145 *and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.*

(2) *If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right :*

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry or where the right

is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(5) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.*

Local inquiry

148. (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

VIII.

Preventive measure by courts by way of restoration of possession of immovable property on conviction for offence.

Power to restore possession of immovable property.

522. (1) Whenever a person is convicted of an offence attended by criminal force *or show of force or by criminal intimidation* and it appears to the court that by such force *or show of force or criminal intimidation* any person has been dispossessed of any immovable property, the court may, if it thinks fit, *when con-*

victing such person or at any time within one month from the date of the conviction order *the person dispossessed* to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

(3) *An order under this section may be made by any Court of appeal, confirmation reference or revision.*

IX.

Preventive Action of the public and Village officers.

Public when to assist Magistrates and police

42. Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

(*a*) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorized to arrest;

(*b*) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

Public to give information of certain offences

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 293, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall,

in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

Village-headmen, accountants, landholders and others bound to report certain matters

45. (1) Every village-headman, village-accountant, village-watchman, village-police-officer, owner or occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police-station, whichever is the nearer, any information which he may *possess* respecting—

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(*c*) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under S. 143, 144, 145, 147 or 148 of the Indian Penal Code;

(*d*) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances *or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;*

(*e*) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely) 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460 489-*A*, 489-*B*, 489-*C*, *and* 481-*D*.

(*f*) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general

or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.

Appointment of village-head-men by District Magistrate in certain cases for purposes of this section

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate *or sub-Divisional Magistrate* may from time to time appoint one or more persons *with his or their consent to perform the duties of a village-headman under this section whether a village headman has or has not been appointed for that village under any other Law.*

X.

Preventive action of the police in respect of vagabonds and suspected persons and habitual offenders.

54. Clause 2. Any police officer may, without an order from a Magistrate and without a warrant arrest any person

having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house breaking.

Arrest of vagabonds, habitual robbers, etc.

55. (*1*) Any officer in charge of a police-station may, in like manner, [*i.e.*, without an order from a Magistrate and without a warrant] arrest or cause to be arrested—

(*a*) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(*b*) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(*c*) any person who is by repute a habitual robber, house-breaker or thief, or a habitual receiver of stolen property knowing it to be stolen, or who by repute habitually committs extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(*2*) This section applies also to the police in the town of Calcutta.

N.B.—For procedure to be followed by a police-officer in connection with arrest without warrant see Secs. 60, 61, 62, 63, Schedule II, page 102.

XI.

Preventive action of the police generally.

Chapter XIII of the code. Preventive action of the Police.

Police to prevent cognizable offences.

149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

Information of design to commit such offences.

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Arrest to prevent such offences.

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Prevention of injury to public property.

152. A police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

Inspection of weights and measures.

153. (*1*) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for

weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

XII.

Of Appeal, Reference and Revision.

Appeal.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Every order under sec. 118 appealable.

Appeal from order requiring security for keeping the peace or for good behaviour.

406. *Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—*

(a) If made by a Presidency Magistrate, to the High Court;

(b) If made by any other Magistrate, to the Court of Session:

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided, further, that nothing in this section

shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

Appeal from order refusing to accept or rejecting a surety.

Appeal from order refusing to accept or rejecting a surety.

406A. *Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,—*

(a) if made by a Presidency Magistrate, to the High Court;

(b) if made by the District Magistrate, to the Court of Session; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

Appeal on which matter lies.

418. An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

Powers of Appellate Courts.

Power of Appellate Court in disposing of appeal.

423. (1) The Appellate Court shall then [*i.e.* if the appeal is not summarily dismissed under section 421] send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an

appeal under section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(*b*) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

(*c*) in an appeal from any other order, alter or reverse such order;

(*d*) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstand-

ing on the part of the jury of the law as laid down by him.

[So far as cases of security are concerned the section will run thus—

Power of Appellate Court in disposing of appeal.

423. (*1*) The Appellate Court shall then [*i.e.* if the appeal is not summarily dismissed under Section 421] send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, the court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(*c*) alter or reverse such order;

(*d*) make any amendment or any consequential or incidental order that may be just or proper.]

Appellate Court may take further evidence or direct it to be taken

428. (*1*) In dealing with any appeal under this Chapter, [Chapter XXXI] the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(*2*) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(*3*) Unless the Appellate Court otherwise directs,

the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

N.B.—Appeals under sec. 515 are excluded from the operation of this section.

Judgment of Appellate Court.

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply so far as may be practicable to the judgment of any Appellate Court other than a High Court:

Provided that unless the Appellate Court otherwise directs the accused shall not be brought up to attend to hear judgment delivered.

[Sec. 367 is therefore applicable].

367. (1) Every such judgment (*i.e.* in every trial in any Criminal Court of Original Jurisdiction) shall except as otherwise expressly provided by this Code be written by the presiding officer of the court or from the dictation of such presiding officer in the language of the court or in English: and shall contain the point or points for determination; the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open court at the time of pronouncing it, and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(6) *For the purposes of this section an order under section 118 or section 123 sub-section 3 shall be deemed to be a judgment.*

Finality of orders on Appeal.

Finality of orders on appeal.

430. Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII (*i.e.* where the Local Government prefers an appeal to the High Court against an order of acquittal or the High Court interferes in revision).

Procedure where Judges of court of Appeal are equally divided in opinion.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Other provisions relating to Appeal.

Appeal to be made in the form of a petition.

Petition of appeal.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under S. 367.

Procedure when appellant in jail.

Procedure when appellant in jail.

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail who shall thereupon forward such petition and copies to the proper Appellate Court.

Summary dismissal of Appeal.

Summary dismissal of appeal.

421. (*1*) On receiving the petition and copy the Appellate Court shall peruse the same, and if it under S. 419 or S. 420, considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that no appeal presented under S. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(*2*) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

Notice of Appeal.

Notice of appeal.

422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under S. 417, the Appellate Court shall cause a like notice to be given to the accused.

Appeal in Cases of conviction.

N.B.—Orders under Sec. 106 can only follow a conviction for an offence. Such orders are not appealable by themselves but go along with the conviction, an appeal being determined by the following provisions No sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

407. (*1*) Any person convicted on a trial held by any Magistrate of the second or third class or any person sentenced under Sec. 349 or in respect of whom an order has been made or a sentence has been passed under Sec. 380 by a Sub-Divisional Magistrate of the second class may appeal to the District Magistrate.

(*2*) The District Magistrate may direct that any appeal under this section or any class of such appeals shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class or any person sentenced under Sec. 349 or in respect of whom an order has been made or a sentence has been passed under Sec. 380 by a Magistrate of the first class may appeal to the Court of session :

Provided as follows :—

(*a*) Repealed by Act XII of 1923, Sec. 23.

(*b*) When in any case an Assistant Sessions Judge or a Magistrate specially empowered under Sec. 30

passes any sentence of imprisonment, for a term exceeding four years or any sentence of transportation, the appeal of all or any of the accused convicted at such trial shall lie to the High Court ;

(c) When any person is convicted by a Magistrate of an offence under Sec. 124A of the Indian Penal Code the appeal shall lie to the High Court.

Appeals to Court of Session how heard.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Appeal from sentence of Presidency Magistrate.

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

No appeal in certain cases when accused pleads guilty.

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in petty cases.

413. Notwithstanding anythnig hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or, *in which a Court of Session or District Magistrate or*

other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payments of fine when no substantive sentence of imprisonment has also been passed.

414. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of fine not exceeding two hundred rupees only.

415. An appeal may be brought against any sentence referred to in Section 413 or Section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

415A. Notwithstanding anything contained in this chapter when more persons than one are convicted in one trial and an appealable judgment or order has been passed in respect of any of such persons all or any of the persons convicted at such trial shall have a right of appeal.

Reference and Revision—Power to call for records of inferior courts.

435. (*1*) The High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate

within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court and may when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-Section and of Section 437.

(*2*) If any sub-Divisional Magistrate acting under sub-Section (*1*) considers that any such finding, sentence or order is illegal or improper or that any such proceedings are irregular, he shall forward the record with such remarks thereon as he thinks fit, to the District Magistrate.

(*3*) Repealed by Act XVIII of 1923, Sec. 116.

(*N.B.* This sub-Section excluded orders under sections 143, 144 and proceedings under Secs. 145, 147, 176 from the operation of the section).

(*4*) If an application under this section has been made either to the Sessions Judge or District Magistrate no further application shall be entertained by the other of them.

Report to High Court.

438. (*1*) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report

for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may, exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him *by, or under any general or special order of, the Sessions Judge.*

Revision by High Court.

High Court's powers of revision.

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429. (See page 78).

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might

have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) *Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.*

Optional with Court to hear parties

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

Special provisions relating to Presidency Magistrates.

Reference by Presidency Magistrate to High Court.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may

either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Disposal of case according to decision of High Court.

433. When a question has been so referred the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before over-ruling or setting aside the said decision or order.

Inherent powers of the High Court.

Saving of inherent power of High Court.

561A. *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*

XIII.

Transfer.

Transfer by Magistrates.

192. (*1*) Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may

transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

528. (1) *Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.*

(2) Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(3) The Local Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

(4) *Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.*

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) *The head of a village under the Madras*

Village-police Regulation, 1816, or the Madras Village-police Regulation, 1821, is a Magistrate for the purposes of this section.

Transfer by the High Court.

526. (*1*) Whenever it is made to appear to the High Court :—

(*a*) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(*b*) that some question of law of unusual difficulty is likely to arise, or

(*c*) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or

(*d*) that an order under this section will tend to the general convenience of the parties or witnesses, or

(*e*) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order—

(*i*) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence;

(*ii*) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such

Criminal Court of equal or superior jurisdiction;

(*iii*) that any particular case or appeal be transferred to and tried before itself; or

(*iv*) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if *so ordered pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application.*

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four

Notice to Public Prosecutor of application under this section.

hours have elapsed between the giving of such notice and the hearing of the application.

(6a) *Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application and;*

(7) Nothing in this section shall be deemed to affect any order made under section 197.

Adjournment on application under this section.

(8) *If, in the course of any inquiry or trial or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.*

(9) *Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.*

SCHEDULE I.

Procedure of Enquiry under Section 117

A Procedure for Summons Cases applicable to proceedings for keeping the peace.

(1) *The mode of trial.*

Substance of accusation to be stated.

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

Conviction on admission of truth of accusation.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted the Magistrate *may* convict him accordingly.

Procedure when no such admission is made.

244. (1) *If the Magistrate does not convict the accused under the preceding section or*, if the accused does not make such admission the Magistrate shall proceed to hear the complaint (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue *a summons to any witness directing him to attend or to produce* any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

[*N.B.* As applied to security cases the sections will run thus—

244—(1) When the person proceeded against appears or is brought before the Magistrate he shall proceed to take all such evidence as may be produced in support of the prosecution and also to hear the person proceeded against and take all such evidence as he produces in his defence.

(2) The Magistrate may if he thinks fit on the application of the prosecution or defence issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court.]

(2) *Mode of recording evidence in cases of security for keeping the peace.*

355. (1) In summons-case tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (*b*) to (*m*), both inclusive when tried by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the

substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

B. Procedure for warrant cases applicable to proceedings for security for good behaviour.

(1) *The mode of trial.*

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution :

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state *at the commencement of the next hearing of the case or if the Magistrate for reasons to*

Defence.

be recorded in writing so thinks fit, forthwith, whether, he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

N.B. The above as applied to security proceedings will run thus—

252—(1) When the person proceeded against appears or is brought before the Magistrate such Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate shall ascertain from the prosecution or otherwise the names of any person likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before himself such of them as he thinks necessary.

256—(1) The person proceeded against shall be required to state at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and after cross-examination and re-examination (if any) they also shall be discharged.

The person proceeded against shall then be called upon to enter upon his defence and produce his evidence.

(2) If the person proceeded against puts in any written statement the Magistrate shall file it with the record.

257—(1) If the person proceeded against after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that when the person proceeded against has cross-examined or had the opportunity of cross-examining any witness under sec. 256 the attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court.

(2) *Mode of recording evidence in proceedings for security for good behaviour.*

Record in other cases outside presidency-towns.

356. (*1*) In all other trials (*i.e.*, other than those provided for in sec. 355—page 92) before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapter XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

Evidence given in English.

(*2*) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(*2a*) *When the evidence of such witness is given in any other language not being English, than the*

language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

Memorandum when evidence not taken down by the Magistrate or Judge himself.

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

357. (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by

the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Mode of recording evidence under S. 356 or S 357.

359. (*1*) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(*2*) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

Procedure in regard to such evidence when completed.

360. (*1*) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(*2*) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(*3*) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Interpretation of evidence to accused or his pleader.

361. (*1*) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(*2*) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(*3*) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

C. Mode of recording evidence in proceedings either for keeping the peace or for good behaviour before Presidency Magistrates.

362. (*1*) In every case *tried by a Presidency Magistrate in which an appeal lies, such Magistrate* shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(*2*) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(*2A*) *In every case referred to in sub-section* (*1*), *the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.*

(3) Sentences passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence, *unless they are sentences of imprisonment ordered to run concurrently.*

(4) *In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.*

N.B. Under Sec. 406 every order under Sec 118 made by a Presidency Magistrate is appealable and therefore in every case of security whether for keeping the peace or for good behaviour evidence has to be recorded by Presidency Magistrates in full.

D. General provisions applicable to all cases.

Local Inspection.

Local inspection.

539B. (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.*

(2) *Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost:*

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this

section unless such jury or assessors are also allowed a view under section 293.

Court's power to summon witness at any stage of the proceeding.

Power to summon material witness or examine person present.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined.

Enquiry in the absence of the accused in certain cases.

Provision for inquiries and trial being held in the absence of accused in certain cases.

540A. (1) *At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.*

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.*

N.B. The section will be applicable in the view that the person proceeded against is an accused.

SCHEDULE II.

Procedure to be followed by a police officer on arrest without warrant.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Person arrested not to be detained more than twenty-four hours.

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

167. (1) Whenever *any person is arrested and detained in custody, and it appears that the* investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station, *or the police-officer making the investigation, if he is not below the rank of sub-inspector*, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or

has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Local Government shall authorise detention in the custody of the police.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order; with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Police to report apprehensions.

62. Officers in charge of police-stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Discharge of person apprehended

63. No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Note:—***For other statutes dealing with prevention of offences see Appendix I***

CHAPTER III.

SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR—GENERAL OBSERVATIONS.

Three classes of security.

Chap. 8 of the Code of Criminal Procedure provides for the taking of security for the purpose of prevention of offences. The primary object of the provisions in this Chapter is not the punishment for past unproved crimes but to prevent the person proceeded against from committing offences in the future. There are three classes of security, *viz.*, security for keeping the peace on conviction, security for keeping the peace otherwise than on conviction and security for good behaviour.

When a person is convicted of certain offences against public tranquillity and some others akin to them he may in the discretion of the court which convicts him be ordered to furnish security for keeping the peace. (Sec. 106.)

Security for keeping the peace may also be taken otherwise than on conviction for the purpose of preventing the commission of a breach of the peace or disturbance of the public tranquillity (Sec. 107). Security for good behaviour may be taken for the purpose of prevention of offences from persons who are vagrants and suspected persons (Sec. 109) and from habitual offenders and desperate and dangerous characters (Sec. 110). The security is not intended to be a punishment for the offences committed and a proceeding under Sec. 110 is not intended to be in any way a substitute for a prosecution for substantive offences committed but its primary object is to to check the evil activities of a person who has formed the habit of committing offences Security may also be taken for the commission of certain specific offences under Sec. 108 which provides for a bond for good behaviour being taken from a person found to have committed certain offences for which

but for this special provision he could only have been tried on substantive charges. This special provision contemplates the cases of persons disseminating seditious matter and any matter likely to promote enmity between classes or any matter concerning a judge which amounts to criminal intimidation or defamation. The object of taking security under Chapter 8 of the Code is the prevention of offences and the only way in which Secs. 108 and 110 may be interpreted as preventive measures is that the bond for good behaviour taken from a person found to have done the acts constituting any of the offences mentioned in the sections will have the effect of preventing him from doing such acts again.

Person proceeded against if an accused.

Is a person proceeded against for the purpose of taking security for keeping the peace otherwise than on conviction or for good behaviour an "accused" as that expression is used in the Code of Criminal Procedure? The question is one of very great importance and deserves special consideration. The word "accused" is nowhere defined in the Code. It was interpreted by the Bombay High Court to mean a person over whom a criminal court exercises Jurisdiction (*Emp. v. Monna Punna 16 Bomb. 661*). This view was accepted by the Calcutta and Allahabad High Courts and it was held that a person proceeded against under Chap. 8 of the Code was an accused in the sense that he had a right to be defended by a lawyer (*Jhojha Sing v. Q. E. 23 Cal. 493: Emp. v. Gerand 25 Al. 375*). This right in question is given by Sec. 340 of the Code which before the amendment in 1923 as also in the Code of 1882 stood as follows "Every person accused before any Criminal Court may be defended by a pleader." Under the Codes of 1861 and 1872, every person charged before any criminal court with an offence had the right of being defended by a lawyer (Sec. 432 of Act XXV of 1861; Sec. 186 of Act X of 1872).

The form in which Sec. 340 was enacted in the Code of 1882 so as to give the right of being defended by a lawyer to every person accused before any Criminal Court was intended

to be an improvement on the earlier law. Evidently the intention of the legislature was to extend the right in question to persons not accused of offences but all the same proceeded against under one or other of the provisions of the Code. This right could not be claimed by such persons under the Codes of 1861 and 1872.

In the case of *Jhojha Sing* referred to above the words of the section were held to be wide enough to include a person ordered to furnish security for good behaviour or for keeping the peace. That case was decided under the Code of 1882 and the section was left unaltered in the Code of 1898 evidently as it was considered sufficient to give the right of defence by a lawyer both to persons accused of offences and those otherwise proceeded against under the Code. In 1923 the legislature decided to secure the right of being defended by a lawyer in express terms to persons proceeded against under the Code though not accused of any offence and with this view the present subsection (1) of section 340 has been enacted to provide that "any person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such court may of right be defended by a pleader."

Subsection 2 of section 340 gives the right to give evidence to many of such persons as though not accused of any offence are proceeded against under the Code.

A full Bench of the Calcutta High Court had occasion to consider the effect of this amendment in deciding whether in a case under Section 145 of the Code it was necessary under Section 360 that the evidence of a witness as soon as completed should be read over to him in the presence of the parties to the proceedings. The majority of the Judges composing the Full Bench came to the conclusion that the word "accused" in section 360 did not include a party to a proceeding under Section 145, relying mainly on the amendment of Section 340 which was taken as an indication that the word "accused" wherever used by itself in the Code meant only a person accused of an offence. (*Narendra Chandra Rudra Pal.* v. *Sabrah Bhuiya 29 C. W. N. 701*).

In this view a person proceeded against under Sections 107,

108, 109, 110, of the Code should not be considered to be an accused and the sections of the Code which contain general provisions for regulating the conduct of trials and the recording of evidence, in which the word "accused" occurs by itself do not apply to enquiries under Chap. 8 of the Code.

As pointed out by Mr. Justice Manmatha Nath Mukherji in the case referred to above, to put this interpretation on the word "accused" will lead to absurdities and in a way revolutionise the system of Criminal Procedure. To give a few instances, Sec. 344 will not apply so as to enable the Magistrate to remand the person proceeded against under Chapter VIII. when such person is in custody for failure to furnish bail on arrest under the proviso to Sec. 114 or on failure to furnish ad interim security under sub-section 3 of section 117 and when such remand is necessary in making an order of adjournment, Sec. 360 will not apply so as to make it necessary that the evidence of witnesses should be read over to them in the presence of the person proceeded against, section 361 will not apply so that it will not be necessary to interpret to the person proceeded against evidence given in a language not understood by him. A part of section 435 will not apply and if such person is in confinement no order for his release could be made by the District Magistrate pending the examination of the record by him, Sec. 435 Sub-Sec. 2. will not apply and there will be no bar to the High Court setting aside an order of discharge without hearing the party in whose favour it has been made as under Sec. 440 such person will not have a right to be heard, Sec. 526 Sub-Secs. (5) and (6) and (8) will not apply and it will not be possible for the High Court to make an order for executing bond as to costs on an application for transfer by a person proceeded against under Chap. 8 of the Code nor will any notice be necessary to be given to the public prosecutor in the High Court before making an application for transfer and no adjournment of the enquiry by the Magistrate will be compulsory inspite of the notification of an intention to move the High Court for transfer, Sec. 371 will not apply and a person proceeded against under Chap. 8 will not be entitled to get a

copy of the judgment although by the addition of Sub-Sec. 6 to Sec. 367 an order under Sec. 118 calling for security has been expressly made a judgment within the meaning of that section of the Code, Sec. 383 will not apply so that there will be no provision for issuing a warrant for committing to jail a person who has failed to furnish the security called for from him under the preventive sections of the Code.

The limited meaning of a person accused of an offence if given to the word "accused" in the Code will give rise to inconsistencies and difficulties like the above some of which will have the effect of denying justice and others of paralysing the administration of it.

Moreover it certainly seems somewhat repugnant to one's conception of an accused person to think that a person who can be arrested, detained in custody, put on bail, restrained by imposition of an order for furnishing security and sent to prison on default thereof—a person whose liberty may be curtailed or taken away in this way—is not an accused person and therefore not eligible to such rights, privileges and protection as an accused person may have under the law.

The true view seems to be that in amending Sec. 340 the legislature by enacting Sub-Sec. (1) simply made it clear beyond doubt that all classes of accused persons whether accused of an offence or otherwise proceeded against under the Code have the right to be defended by a lawyer. In Sub-Sec. 2 the legislature simply removed in the case of some particular classes of accused persons a disability which ordinarily attaches to accused persons and this was the view expressed in the statement of objects and reasons for the amendment.

The accused was at one time not a competent or compellable witness under the English Common Law but the position has now greatly changed in consequence of a series of statutory provisions.

The Indian legislature is gradually making an advance in that direction.

An objection to interpreting the word "accused" so as to include a person proceeded against in an inquiry for security for keeping the peace or for good behaviour is raised on Sub-

Sec. 4 of the Sec. 342 under which "no oath shall be administered to the accused" and it is said that if the intended meaning be given to the word "accused" a person proceeded against in any of the proceedings mentioned in Sub-Sec. 2 of Sec. 340 will be a competent witness if he offers himself as one but his examination cannot be on oath.

Sub-Sec. 4 of Sec. 342 as the two other sub-sections 2 and 3 must be read along with the Sub-Sec. I. which lays down how and when the accused may and should be examined. Sub-Sec. I. provides for the court putting questions to the accused. Sub-Sec. 2 deals with the refusal of the accused to answer such questions. Sub-Sec. 3 deals with the use to which the answers given by the accused to such questions may be put. Sub-Sec. 4 prohibits the administration of oath to the accused when putting such questions. Before 1923 the only provision for the examination of an accused person was that in Sec. 342 which laid down a sort of complete procedure regulating such examination, one branch of which was that no oath should be administered to the accused. In 1923 a new provision for the examination of certain classes of accused persons has been made in Sub-Sec. 2 of Sec. 340 and for such examination no provision or prohibition as to administration of oath has been made in the Code. The matter then depends on the Indian Oaths Act, under Sec. 5 of which oaths or affirmations should be made only by persons who may be lawfully examined or give or be required to give evidence by or before a court but it shall not be legal to administer in a criminal proceeding an oath or affirmation to the accused. A person proceeded against in any of the proceedings mentioned in Sub-Sec. 2 is an accused in a criminal case and it is not lawful for the court to administer any oath to him. Such a person cannot be examined under Sec. 342 of the Code of Criminal Procedure which is limited in its application to enquiries into or trials for offences only. But under Sub-Sec. 2 of Sec. 340 such a person may offer himself as a witness. It is all optional with him whether or not to do so and there is no power in the Court to compel him to give evidence. If he offers himself as a witness he, by his voluntary act, makes himself

a witness in his own case and must be examined as all other witnesses and must be under the first part of Sec. 5 of the Oaths Act sworn or affirmed. The provision of Sub-Sec. 2 of Sec. 343 giving immunity from punishment for refusal to answer or giving false answer will not be applicable to a voluntary examination as a witness under Sub-Sec. 2 of Sec. 340.

The word accused is not used in the same sense in all parts of the Code. In the Codes of 1861 and 1872 the word "accused" and the expressions "accused person charged with an offence" and "offender" were used without anything to indicate that any distinction was meant.

The same expressions were used though not so quite largely in the Code of 1882. In the Code of 1898 a person against whom an order for maintenance was applied for was designated an accused person and it was provided that he could tender himself as a witness and that in such a case he should be examined as such (Sec. 488 Sub-Secs. 7 and 9 of Act V of 1898). Act V of 1898 was an Act to consolidate and amend the law relating to Criminal Procedure. The Acts of 1923 are merely amending Acts. The policy of the law has to be gathered from a study of the Act of 1898 with the aid of such light as may be afforded by the amendments subsequently made therein. In the face of the provision contained in Sub-Secs. 7 and 9 of Sec. 488 of Act V of 1898 referred to above it cannot possibly be contended that the legislature used the expression "accused person" in all parts of the Code in the narrower sense of a person accused of an offence. This conclusion is further supported by a consideration of the amendments introduced in 1923 in at least two places. In Sec 340 the words in the Code of 1898 were "every person accused of an offence before a Criminal Court or against whom proceedings are instituted under the Code in any such court." This clearly shows that an "accused person" is not identical with a person accused of an offence and there is no reason to suppose that the word "accused" where it was used in the Code of 1898 and where it has retained its place after the amendment may not include both the classes of persons mentioned above unless there is something in the context repugnant to that meaning.

The other instance is still more clear. In Sec. 436 of the Code of 1898 the words "any accused person who has been discharged" have been altered to "any person accused of an offence who has been discharged." This also shows that where the word has not been altered it is capable of the wider meaning. Reference may also be made in this connection to Sec. 499 which applies not merely to persons accused of an offence but also to those dealt with under Chap. VIII. of the Code and the marginal note to that section runs as "Bond of accused and sureties."

In the chapter dealing with enquiries in trials relating to offences the word "accused" wherever it occurs necessarily means a person accused of an offence.

In the case of general provisions relating to enquiries or trials in such of them as relate to procedure applicable to all proceedings under the Code the word "accused" is used in its wider significance unless the context suggests a narrower meaning.

The word is not defined in the Code of Criminal Procedure or the Indian Penal Code and the legislature does not say that it is to be taken in the same sense wherever it has been used. The word has no well defined or recognised meaning in other systems of law, the word defendant being more often used instead of the word accused. To build an argument on a supposed policy on the part of the legislature when really there is none and to assume a uniformity and on such assumption to attempt to explain away diversity is fallacious.

As pointed out above the language of Sub-Sec. I. of Sec. 340 points to the fact that an "accused person" is not identical with a person accused of an offence. What does an examination of Sub-Sec. 2 show? The right to give evidence is given to some persons proceeded against under the Code otherwise than for an offence, which right would have been denied to them but for a special enabling provision. The reason for denying the right to such persons is the general rule that an "accused" cannot examine himself as a witness and persons proceeded against under the Code otherwise than for an offence

are all "accused" and therefore debarred from giving evidence themselves.

If this is not the meaning of Sub-Sec. 2 then there is nothing to prevent the classes of persons proceeded against under the Code otherwise than for an offence, who are not mentioned in Sub-Sec. 2, from examining themselves as witnesses for they are not accused persons and do not come within the general rule which prohibits an accused from giving evidence. Notable among such classes of persons will be those proceeded against for bad livelihood who will be able to give evidence themselves in their own behalf although it is as clear as anything that the intention of the legislature is not to allow such persons to offer themselves as witnesses. In trying to bring the Indian law on a par with the English law so far as the right of accused persons to give evidence is concerned the legislature has proceeded cautiously. Throughout Chapter VIII. a distinction is maintained between a proceeding for security for keeping the peace and one for security for good behaviour, the former being considered as a less serious case than the other, the former being considered as a summons case and the latter as a warrant case, the Magistrate being given the discretion to dispense with the personal attendance of the person proceeded against in the former class of cases as in summons cases, imprisonment for failure to furnish security in the former class of cases being simple while that in the latter class of cases under Secs. 109, 110 being rigorous or simple in the discretion of the Court. Consistently with this the legislature has allowed the person proceeded against in the former class of cases the right to give evidence but has refrained from giving it to those proceeded against in the latter class of cases who are considered as a worse type of accused persons.

The amendment of Sec. 340 clearly shows that in the view of the legislature there are accused persons besides those accused of an offence.

The word "accused" not being used in all parts of the Code in the same sense, wherever it occurs by itself in the Code it should be interpreted according to the context to mean either a person proceeded against under the Code otherwise than for

an offence or a person accused of an offence but generally it includes both classes of persons.

The conclusion therefore is irresistible and it is consistent with the general policy of the Code that a person proceeded against under Chapter VIII. of the Code is an accused person and is entitled to all the privileges and is subject to all the disabilities of an accused person.

The amendment of Section 362 by the addition of Sub-section 2A makes it abundantly clear that persons proceeded against for security for keeping the peace or for good behaviour are accused persons. Section 362, as it now stands, provides that in every case tried by a Presidency Magistrate in which an appeal lies there is no such exemption from making a record of the evidence as such Magistrates have the advantage of in other cases under Sub-Section 4 of that section. Formerly there was an exemption in cases in which the Presidency Magistrates inflicted a sentence which was not appealable and the exemption was necessarily confined to cases of offences only. Under section 406 as it now stands after the amendment in 1923 every order made by a Presidency Magistrate under Section 118 whether for keeping the peace or for good behaviour is appealable to the High Court. Therefore under the present Sec. 362 in every case of enquiry under Chapter VIII of the Code, whether for keeping the peace or for good behaviour, evidence has to be recorded by a Presidency Magistrate. Along with the other changes made in section 362 and section 406 the legislature has added Sub-Section 2-A to Section 362 under which in all cases in which an appeal lies the Presidency Magistrate is bound to make a memorandum of the substance of the examination of the accused. The words used in Sub-Section 2-A are "in every case referred to in Sub-Section (1)" (*i.e.*, in which an appeal lies). This is very significant. The legislature makes the recording of the substance of the examination of the accused compulsory in every case in which an appeal lies. The existence of an accused in every such case follows as a matter of course and to say that the memorandum of the substance of the examination of a person proceeded against under the Security

Sections is not to be made because such a person is not an accused is to read something into the Section which is not there and to arrogate the functions of the legislature, which could have made an exception in the case of security proceedings if it had the intention of excluding them from the operation of Sub-Sec. 2A.

Before the amendment, Sec. 362 made it necessary for a Presidency Magistrate to record evidence only in a case in which the sentence was one of fine exceeding two hundred rupees or imprisonment for a term exceeding six months. The Section, as it then stood, contemplated only cases of offences and it is significant that while making every order for security for keeping the peace or for good behaviour appealable the legislature has altered Section 362 so as to make the recording of evidence and the making of a memorandum of the substance of the examination of the accused compulsory in every case in which an appeal lies.

The addition of Sub-Section 2A to Sec. 362 coupled with the alterations made in Sub-Sec. I. of Sec. 362 and in Section 406 is the clearest indication that the legislature in overhauling the Code in 1923 intended that a person proceeded against under Sec. 117 should come within the category of an accused.

Discretionary with the Magistrate to take action under the Security Sections of the Code.

It is discretional with the Magistrate whether or not to take action for security for keeping the peace or for good behaviour. In all cases of security whether for keeping the peace on conviction or for keeping the peace otherwise than on conviction or for good behaviour, as also in all cases under Secs. 133, 144 of the Code the legislature has enacted that a competent Magistrate may take action on receipt of certain information necessary for the initiation of a proceeding but in cases of dispute relating to immovable property under Sec. 145 when the conditions laid down in the Section are fulfilled the Magistrate is bound to take action and proceed in the manner laid down. In cases of disputes relating to rights of use of

immovable property it is however left to the Magistrate to decide whether or not to proceed under Sec. 147. The provisions of Secs. 106, 107, 108, 109, 133, 144 and 147 of the Code are discretionary but those of Section 145 are mandatory.

Effect of amendment made in sections 107, 108.

In sections 107 and 108 of the Code the legislature has in amending the Code in 1923 expressly laid down that the Magistrate may take action *if in his opinion there is sufficient ground for proceeding.*

No such express provision has been added in Sections 109 and 110. The express provision in question simply emphasises that the Magistrate is in no way bound to take action even on receipt of information formally fulfilling the requirements necessary for the initiation of proceedings for security. Section 112 which governs alike all cases under Sections 107, 108, 109, 110 lays down that when the Magistrate *deems it necessary* to require any person to show cause against an order for security he shall proceed in the manner provided for. The absence of the express provision is Sections 109 and 110 cannot in reality make any difference in the face of the words of the statute that the Magistrate *may take action* under certain circumstances and not that the Magistrate shall take action. The necessity of adding the special provision in Sections 107 and 108, making it a condition precedent to the initiation of proceedings, that the Magistrate should be of opinion that there is sufficient ground for proceeding is not apparent. If it was thought desirable as a matter of precuation to direct the Magistrate expressly to do what he is bound to do in the *judicial* exercise of his powers, which the legislature says, he may exercise under certain circumstances only, it is beyond comprehension why the necessity for the precaution should be taken to be present only in cases under Sections 107 and 108 and not under Section 109 and 110, the powers under which are very large and exceptional which, judicial decisions lay down, must be exercised with great caution (*N.B.*—As to Section 107 see the note under Security for keeping the peace otherwise

than on conviction). It goes without saying that so far as the present matter is concerned, the legislature has unnecessarily interfered with the wording of certain sections overlooking that this may throw doubt as to the scope and meaning of the other cognate sections.

Arrest and detention in custody of person proceeded against under the Security Sections.

The powers of a Magistrate for arresting a person, pending an enquiry for security for keeping the peace or for good behaviour, and detaining him in custody are to be found in cl 4 of Section 107, proviso to Section 114 and cl. 3 of Section 117.

Besides the above there are no other powers of arrest or detention.

Bonds with or without surety.

A bond taken for keeping the peace otherwise than on conviction under Section 107 and for good behaviour under Section 108 may be with or without surety but those under Sections 109 and 110 must be with surety.

Procedure to be followed in security proceedings.

The procedure to be followed in an enquiry for security for keeping the peace otherwise than on conviction or for good behaviour is the same and Sections 112 to 119 apply equally to both classes of cases, and so far as proceedings subsequent to order requiring security are concerned, Sections 120 to 125 apply to cases of bonds for keeping the peace on conviction, to bonds for keeping the peace otherwise than on conviction as also to cases of bonds for good behaviour. Sub-secs. 2, 3, 3A, 3B, of Sec. 123 do not apply to cases under Secs. 107, 108 and 109.

Distinction between security proceedings for keeping the peace and those for good behaviour.

A distinction is observed between an enquiry for security to keep the peace and an enquiry for good behaviour, the

former has to be conducted as nearly, as may be practicable, in the manner prescribed in the Code for conducting trials and recording evidence in summons cases and the latter in the manner of warrant cases, except that no charge need be framed.

Under section 116 the Magistrate may dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace and may permit him to appear by pleader. This exemption from personal appearance cannot be allowed in cases of enquiry for security for good behaviour. Under Section 205 of the Code personal attendance of the accused may be dispensed with by a Magistrate and permission may be given to appear by pleader in cases in which a summons has been issued. Such exemption cannot be allowed where a warrant has been issued. The exemption from personal attendance contemplated by Section 116 is consistent with the distinction between a breach of the peace enquiry and a good behaviour enquiry as that between a summons case and a warrant case.

A distinction has also been maintained between the two classes of cases in the matter of imprisonment to be inflicted in default of furnishing security. Another notable distinction is that a person proceeded against under Section 107 can offer himself as a witness but one against whom proceedings are taken under Sections 108, 109, 110 cannot do so (Section 340 cl. 2).

Special provision for young persons ordered to give security.

When the person in respect of whom the order for security is made is a minor the bond shall be executed only by the sureties. Proviso to Section 118 cl. 3 ; see also Section 514-B.

Under Sec. 21 of Bengal Act II of 1922 (The Bengal Children Act), notwithstanding anything to the contrary contained in any law, no child or young person shall be committed to prison in default of furnishing security, unless the court certifies that he is so unruly or so depraved a character that he is not a fit person to be sent to a reformatory school and that none of the other methods in

which the case may be legally dealt with is suitable. Under Section 22 Sub-Section 5 of the Act when a young person has been ordered by a court to give security under Section 106 or Section 118 of the Code of Criminal Procedure and has failed to do so the court which made the order may direct such young person to be sent to a Reformatory school. For the purposes of this Act "child" means a person under the age of fourteen years and young person means a person who is fourteen years of age or upwards and under the age of sixteen.

Special provisions of Chapter XXXIII of the Code.

The special provisions relating to cases in which European and Indian British subjects are concerned, contained in Chapter XXXIII of the Code, are confined to trial of offences only.

Commission for the examination of witnesses.

The provisions in Chapter XL of the Code relating to commissions for the examination of witnesses apply to enquiries under Chapter VIII of the Code.

Confiscation of property.

An order under section 517 of the Code can be made following an order for bond under Chapter VIII. The only instance in which it may be ordinarily necessary to invoke the application of this Section is in a case under Section 108 in which the publication which is the basis of the proceeding may have to be confiscated or destroyed.

CHAPTER IV.

SECURITY FOR KEEPING THE PEACE ON CONVICTION.

Security for keeping the peace on conviction.

106. (*1*) Whenever any person accused of *any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of* assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court, *including a Court hearing appeals under section 407*, or by the High Court when exercising its powers of revision.

Note:—Sec. 349 lays down the procedure to be followed by a Magistrate of the second or third class when such Magistrate is of opinion that in a case before him an order under Sec. 106 should be made.

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History of section 106 Cr. P. C.

(*a*) *Code of 1861 (Act XXV.).*

In the first Code of Criminal Procedure passed in 1861 ample provision was made in sections 280, 281 for preventive measures being taken by courts on conviction for rioting, assault or other breach of the peace or with abetting the same or with assembling armed men or taking other unlawful measures with the evident intention of committing the same. If in the opinion of the court convicting the accused it was just and necessary to require a personnal recognizance for keeping the peace it could direct him to execute a formal engagement, in a sum proportionate to his condition in life and the circumstances of the case for keeping the peace. The maximum period for which the recognizance could be taken was one year, if the conviction was before a Magistrate, and three years, if before a Court of Session. In cases in which it might appear necessary, courts might on conviction for any of the aforesaid offences require security bond to be given by sureties in addition to the personal recognizance of the person bound over. If the security bond was not furnished the accused might be kept in custody for any

time not exceeding one year, if the order was passed by a Magistrate or three years if the order was passed by the Sudder Court or by the Court of Session.

(*b*) *Code of 1872 (Act X).*

The law was substantially the same in sections 489 and 490 of the Code of 1872 which corresponded to sections 280 and 281 respectively of the Code of 1861.

(*c*) *Code of 1882 (Act X).*

The Code assumed its present form in 1882 and section 106 replaced the former provisions relating to security for keeping the peace on conviction. The offence of criminal intimidation was added to the list of offences, conviction for which gave the court jurisdiction to demand security but the criminal intimidation was to be by "threatening injury to person or property." The bond to be called for was made proportionate to the means of the accused instead of its being "proportionate to his condition in life and the circumstances of the case." The maximum period for the bond was made three years in all cases irrespective of the status of the court making the order for security.

(*d*) *Code of 1898 (Act V) before amendment in 1923.*

In the Code of 1898 the words "other breach of the peace" were substituted by "other offence involving a breach of the peace." Criminal intimidation by itself was made an offence conviction for which would justify an order for security without the additional element of "threatening injury to person or property." Clause 3 was added to provide for an order for security being made by an appellate court or by the High Court in revision.

(*e*) *Amendment of 1923.*

In amending the Code in 1923 the legislature has replaced the words "rioting" and "assembling armed men or taking other unlawful measures with the evident intention of committing the same" by "any offence punishable under Chapter VIII

of the Indian Penal Code other than an offence punishable under sections 143, 149, section 153A or section 154 thereof or of." The legislature has specifically made a conviction for any of the offences mentioned in Chapter VIII of the Indian Penal Code except those under sections 143, 149, 153A, 154, a ground for an order for security. (N. B. see discussion later under the heading Convictions which may be followed by order under section).

As doubts were expressed as to the power of an appellate court to make an order for security in a case where the conviction was by a Magistrate, who was not empowered to make an order for security, the legislature has amended clause 3 so that a District Magistrate hearing an appeal from a conviction by a Magistrate of the second or third class can now make an order for security under section 106. The power of the High Court to make an order in revision in such a case was already there.

SUMMARY OF LAW RELATING TO SECURITY FOR KEEPING THE PEACE ON CONVICTION.

Convictions which justify order.

A bond for keeping the peace may be required from a person convicted of any offence against public tranquillity punishable under Chapter VIII of the Indian Penal Code, except offences under sections 143, 149, 153A, 154 (*i.e.*, offences under sections 144, 145, 147, 148, 150, 151, 152, 153, 155, 156, 157, 158, 160, I. P. C.) or of assault (*i.e.*, various kinds of assault under sections 351, 352, 353, 354, 355, 356, 357, 358, I. P. C.), or of other offence involving a breach of the peace, or of abetting the commission of any of the aforsaid offences or of the offence of criminal intimidation. It is the commission of the offence of criminal intimidation and not abetment thereof, that can be a ground for making an order for security.

(*N.B.*—The Bengal children Act II of 1922 authorises a court to send a youthful offender to a reformatory school on failure to give security for keeping the peace on conviction).

Magistrates who can make order.

On such conviction a Magistrate of the first class, a Sub-Divisional Magistrate (who may be Magistrate of the second class), a Presidency Magistrate, a Court of Session or a High Court may make an order for security (section 106).

Procedure for Magistrates of the second and third class.

If a Magistrate of the second or third class, in a case tried by him, is of opinion, after hearing the evidence for the prosecution and the defence, that the accused is guilty and an order for security should be made, he is to record his opinion and submit his proceedings and forward the accused to the District Magistrate or Sub-Divisional Magistrate who may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence and shall pass such order in the case as is according to law. If there are several accused and if in respect of any one of them, action should in the opinion of the trying Magistrate, be taken by way of reference to a superior Magistrate the cases of all the accused are to be submitted to the superior Magistrate. (Section 349).

Magistrates of the second and third class erroneously making order.

If a Magistrate not being empowered by law in this respect demands security to keep the peace his proceedings shall be void (section 530).

Order to follow conviction and sentence.

The order for security can be made only on conviction and not by itself.

The conviction must be for an offence contemplated by the section.

The time for making the order is that of passing sentence.

The sentence may be one of imprisonment or fine or both.

Breach of bond.

The bond is for keeping the peace and the commission of a breach of the peace is a breach of the bond.

(N.B. No form of a bond under section 106 is given in the Code. Form No. X. in schedule V is the bond for keeping the peace under section 107).

Nature and period of bond.

The bond may be with or without sureties. The maximum period for which bond may be taken is three years.

The amount of the bond must be proportionate to the means of the accused.

Consequence of acquittal in higher court.

The order for bond cannot stand irrespective of the conviction and if the conviction is set aside on appeal or revision the bond taken becomes void.

Power of Appellate Court and High Court in revision.

An order for security can be made by an Appellate Court or the High Court in revision even in a case in which the conviction was by a Magistrate not empowered to make an order under section 106.

Commencement of bond.

The period for which security is required is to commence on the expiration of the sentence inflicted on the accused, if it is one of imprisonment substantively or in default of fine, and immediately, if it is one of fine and the fine is paid (section 120).

Default in furnishing bond.

Where the sentence is one of imprisonment and the security called for is not furnished the accused shall on the expiration of the period of the sentence be detained in prison until the period for which security has been called for expires or the security is furnished (subsection 5, section 123).

Imprisonment for failure to give security for keeping the peace is to be simple (subsection 5, section 123).

Reference to Sessions Judge in Muffasil and High Court in Presidency Town.

If the security has been demanded for a period exceeding one year and it is not furnished the procedure laid down in section 123 has to be followed and a reference has to be made to the Sessions Judge in the muffasil and to the High Court in a Presidency Town and the person proceeded against is to be detained in prison pending the orders of the higher court If there are several accused persons and if the case of any one of them has to be referred to the higher court the cases of all the other co-accused must also be submitted (subsection 3A section 123).

Security may be offered to officer in charge of jail.

If the security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Court or Magistrate who made the order and shall await the orders of such court or Magistrate (subsection 4, section 123).

(N. B. In cases disposed of by a higher court whether under section 123 or in appeal the reference is to be made to the court which made the order originally).

Special power of District Magistrate and Chief Presidency Magistrate where security not furnished.

The District Magistrate or Chief Presidency Magistrate may discharge a person imprisoned for failure to give security under order of any court higher or lower, whenever he is of opinion, that such person may be released without hazard to the community or to any other person, or may reduce the amount of the security or the number of sureties or the period for which security has been required. This latter power may be exercised only when the security was called for by a court not superior to the District Magistrate or Chief Presidency Magistrate, in other words, it may not be exercised in respect of

security taken by a Court of Session or High Court following a conviction before itself. The prohibition will not apply to an order for security made by a Magistrate but confirmed or altered by the Sessions Judge or High Court for in that case the order is an order of a court not superior to that of the District Magistrate.

The discharge may be unconditional or upon any conditions which the person discharged accepts.

The condition must be accepted by the accused and no condition can be forced upon him.

If any condition, on which the discharge was made, is not fulfilled the order of discharge may be cancelled by the District Magistrate or Chief Presidency Magistrate by whom it was made and the person discharged may be rearrested and detained in custody for the unexpired period of the bond or until the security is furnished (section 124).

Special power of District Magistrate and Chief Presidency Magistrate where security furnished.

In cases, in which the security called for has been furnished, the District Magistrate or Chief Presidency Magistrate may, at any time, for sufficient reasons, cancel any bond, whether for keeping the peace or for good behaviour, executed by order of any court in his district not superior to his own. The District Magistrate or Chief Presidency Magistrate has full plenary powers in this respect. He can cancel a bond on the ground that it is no longer necessary as also on the ground that it was not necessary to be taken when the order was originally made (section 125).

Magistrate's power in respect of sureties.

A Magistrate may refuse to accept any surety offered or may reject any surety previously accepted by him or his predecessor on the ground that such surety is an unfit person for the purpose of the bond. But before making such an order the Magistrate must himself hold an enquiry on oath or cause such enquiry to be held and a report to be made thereon by a Magistrate subordinate to him (section 122).

(*N.B.*—The section speaks of Magistrates only. There is no corresponding provision for refusing to accept or rejecting a surety already accepted so far as higher courts are concerned).

Appeal.

The order for security is not appealable on its own account but goes with the conviction which is appealable or not according to the sentence passed and the status of the court before which the conviction is had, nor does the order for security make a sentence appealable if it is not appealable on its own account.

But every order refusing to accept a surety or rejecting a surety is appealable to the District Magistrate if made by a Magistrate other than the District Magistrate and to the Court of Session if made by the District Magistrate and to the High Court if made by a Presidency Magistrate.

Deposit of money instead of bond.

In lieu of executing the bond called for, the court may permit the accused to deposit a sum of money or Government promissory-notes to such amount as the court may fix (section 513).

Forfeiture of bond.

Whenever it is proved to the satisfaction of the court by which the bond was taken or of the court of a Presidency Magistrate or Magistrate of the first class that such bond has been forfeited the court shall record the grounds of such proof and is to follow the procedure laid down in section 514 of the Code.

All orders made for forfeiture of a bond by any Magistrate other than a Presidency Magistrate or District Magistrate are appealable to the District Magistrate or if not so appealed may be revised by him (section 515).

(N.B.—The power can be exercised by the court which made the order for security as also by any Presidency Magistrate or Magistrate of the first class. It must be that the

Magistrate, answering to the description aforesaid, within the local limits of whose jurisdiction the person bound down may be, will move in the matter on the application of the police It is immaterial by which court the order for security was made or where the breach of the bond took place).

ADMINISTRATION OF SECTION 106 CR. P. C.

Object of order under section 106.

The order for security under section 106 is a preventive measure to be taken on conviction for certain offences, the nature of which makes the commission of a breach of the peace by the accused likely and the order is intended to prevent this breach of the peace in the future. It is not intended to be a punishment for the offence committed. That punishment is the substantive sentence in the case. The security is a restraint on the future conduct of the accused, such restraint being made necessary by his past conduct as disclosed in the case in which he is convicted.

Jurisdiction of Magistrates.

Besides the High Court and the Court of Session a Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate or a Magistrate of the first class can make an order under the section but Magistrates of the second and third class cannot. Under section 13 of the Code a Magistrate of the second class may be appointed by the Local Government as a Sub-Divisional Magistrate and a Magistrate of the second class who is a Sub-Divisional Magistrate can take action under the section. The maximum period for which he can sentence the accused to imprisonment is six months but he can take security for keeping the peace for a period of three years (*Raja Sing* v. *Emp.* 13 *A. L. J.* 268).

Time when order under section 106 should be made.

The order should be made when passing sentence on conviction and not at any subsequent time (*Ramadhin* v. *Emp.* 21 *A. L. J.* 839).

Convictions which may be followed by order under section 106.

Under the section, as it now stands after the amendment of 1923, a conviction for any offence against public tranquillity mentioned in Chapter VIII of the Indian Penal Code (except those punishable under sections 143, 149, 153A and 154) or for assault, *i.e.*, different kinds of assaults under sections 152, 351, 352, 353, 354, 355, 356, 357, 358, or for any other offence involving a breach of the peace or for abetting the commission of any of the aforesaid offences or for criminal intimidation (section 506, 507 I. P. C.) may be followed by an order for security, if in the opinion of the court convicting the accused it is necessary to require such person to execute a bond for keeping the peace.

It is noteworthy that abetment of criminal intimidation is not a ground for an order under the section, although abetment of all the other offences mentioned in section 106 is.

Offences of Chapter VIII I. P. C. which are excluded.

Offences punishable under sections 143, 149, 153A, 154.

Effect of amendment excluding section 149 I. P. C.

The amendment of section 106 in 1923 has excluded a conviction by the operation of section 149 I. P. C. along with those under sections 143, 153A and section 154 I. P. C. The section, as amended, speaks of an offence punishable under section 149 I. P. C. but no offence can be punishable under that section itself. There must be some substantive offence charged under some other section of the Penal Code to be read with section 149 (*Chedi Sing* v. *Emp.* 3 *Pat.* 870).

Other offence involving a breach of the peace.

In the Codes of 1861, 1872 and 1882 the words were "rioting assault or other breach of the peace or of abetting the same or of assembling armed men or taking other unlawful measures with the evident intention of committing the same."

In 1898 the words "other offence involving a breach of the

peace" were substituted for the words "other breach of the peace." The object of making the change was to enlarge the scope of the section.

Taking the words to be "rioting assault or other breach of the peace" it is quite clear that the word "other" could not mean simply "not included in Chapter VIII of the Penal Code," for the offence of rioting occurs in Chapter VIII and various kinds of assault are to be found in Chapter XVI. The words undoubtedly meant—rioting, the different kinds of assault under section 152 and sections 351 to 358 or any other offence which is a breach of the peace in the same way in which rioting and assault are breaches of the peace. The word "other" must mean other than rioting and assault.

The other breaches of the peace might be found in Chapter VIII of the Penal Code or elsewhere. The other offences must like rioting and assault include a breach of the peace as a necessary ingredient. Besides rioting and assault affray would come in under "other breach of the peace" but it is difficult to see what other offence there is which is by itself a breach of the peace and would fall within the meaning of the words. The object of section 106 is the prevention of the commission of breach of the peace by a person whose conduct in committing the offence, of which he is convicted, makes it likely for him to break the peace and not merely by a person who has committed a breach of the peace and thereby committed an offence and is convicted of it and in order to make this clear the legislature in 1898 used the words "other offence involving a breach of the peace." The object of making the alteration was to give effect to the scope of section 106 to its fullest extent, *viz.*, to provide for an order for security whenever on conviction for an offence it was proved that a breach of the peace was involved in the commission of the offence, which by itself might not be a breach of the peace but which was committed under circumstances which made it necessary to guard against the likelihood of a breach of the peace by an order for security.

By the words "assembling armed men or taking other unlawful measures" some of the offences of Chapter VIII of the Penal Code were meant and the commission of those, which

though not themselves breaches of the peace, might justify an order, if the commission was with the evident intention of committing a breach of the peace. Under the section there must be a conviction for an offence and the words in question must have referred to some definite offences of which a person might be convicted but it was not clear which of the offences of Chapter VIII besides rioting and assault (under section 152) could be meant. The legislature has now removed all ambiguity and specifically laid down that conviction for any offence under Chapter VIII except the four mentioned in the section (sections 143, 149, 153A, 154) may be a ground for an order for security. So far as the other offences specifically referred to are concerned, a conviction for any one of them, by itself, would justify an order but in other cases it must be found that a breach of the peace was involved. An offence of which the breach of the peace is an ingredient cannot be committed without a breach of the peace taking place. A breach of the peace may not be involved in the offences under the sections of Chapter VIII I. P. C. referred to in section 106 in the sense of being a necessary ingredient and therefore the meaning of "being a necessary ingredient" which could be given to the word 'involving' when the words were 'rioting assault or other offence involving a breach of the peace' " cannot be attributed to them now. Rioting and assault are offences in which a breach of the peace is an ingredient and other offences must be an offence in which likewise it is an ingredient but the offences of Chapter VIII of the Penal Code, now referred to are not all necessarily offences in which a breach of the peace is an ingredient and therefore "other offence" cannot now be an offence in which a breach of the peace is necessarily an ingredient.

The words "other offence" must be taken to be *ejusdem generis* with those mentioned and where some of the offences mentioned are such as to include a breach of the peace as a necessary ingredient while in the others a breach of the peace is not a necessary ingredient but in which the probability of a breach of the peace is involved, the legitimate way of interpreting the words "other offence involving a breach of the

peace" is to take them as meaning offences in which the breach of the peace is either an ingredient or in which the probability of it is involved. If a breach of the peace is a necessary ingredient of an offence involving a breach of the peace then necessarily such breach must have taken place when the offence was committed so that, in that view, in all cases in which an order under section 106 can legitimately be made a breach of the peace must have taken place but if an offence involving a breach of the peace is one in which the breach of the peace is either an ingredient or in the commission of which the probability of breach of the peace is involved, then in a case fit for an order for security under section 106 a breach of the peace need not have actually taken place. It is only necessary that the conviction must be for some offence connected with a breach of the peace in either of the senses referred to above.

The effect of the amendment of section 106 in 1923 by replacing "rioting" by the offences of Chapter VIII I. P. C. with the exceptions mentioned must be to give the expression "other offence involving a breach of the peace" the meaning of being connected with breach of the peace in either of the senses of including a breach of the peace as an ingredient or including the probability of a breach of the peace.

If the word "other" is not interpreted on the *ejusdem generis* principle then the meaning may be attributed to the words of the section that they refer to any offence in committing which a breach of the peace has taken place. In this view, on conviction for any offence, if it is proved that a breach of the peace has taken place in committing an offence, an order for security can be made. If this is the correct view then perhaps it is also correct to interpret the words as meaning any offence the circumstances of the commission of which show that a breach of the peace was probable. The effect then would be to justify an order for security on conviction for any offence, if the circumstances under which it was committed show that a breach of the peace was probable or, in other words, might have taken place. This is the widest meaning possible that the words used by the legislature can be given but it cannot be said to be violent, having regard to the object of section 106.

There is provision for security for keeping the peace otherwise than on conviction for an offence in section 107 of the Code and the foundation of an order relating to that kind of security is information received by the Magistrate of the likelihood of a breach of the peace by the person proceeded against. Section 106 provides for security on conviction for an offence, but the object is the same, namely, the prevention of a breach of the peace. In the former case an information is laid before the Magistrate who tests it by an inquiry, in the latter certain facts are proved before the Magistrate which besides showing that the accused has committed an offence indicate the necessity of an order for security to prevent a breach of the peace. The facts proved before the Magistrate supply him with the information as to the likelihood of a breach of the peace In the former class of cases a breach of the peace has not taken place but may take place and the order of the Magistrate is intended to prevent its taking place. There is no reason why it should be necessary in the latter class of cases that the breach of the peace must have taken place, it is enough if the facts are such as to show a likelihood of a breach of the peace in future. It is this likelihood of a breach of the peace in future which is the foundation of the court's jurisdiction both under section 106 and 107 and this likelihood may arise from facts which may vary according to circumstances. It may arise from the fact of an offence having been committed which is a breach of the peace itself or from the fact of an offence having been committed which by its very nature made the happening of a breach of the peace probable. It may also arise from the fact of an offence having been committed under circumstances in which a breach of the peace took place or which made the happening of a breach of the peace probable although no breach actually took place.

Three classes of offences are then contemplated—an offence in which a breach of the peace is an ingredient which cannot be committed without a breach of the peace taking place, an offence which involves the probability of a breach of the peace which may be committed without a breach of the peace taking place but in which there is always a chance of a breach of the

peace, and an offence which ordinarily has nothing to do with a breach of the peace, in which ordinarily there is no chance of a breach of the peace, but which was committed under circumstances in which a breach of the peace took place or the taking place of a breach of the peace was made probable.

The widest meaning of the words "involving a breach of the peace" would include all the three classes of offences aforesaid and perhaps this is the legitimate object of section 106.

In the view expressed above an order under section 106 can be made on conviction for any of the offences expressly mentioned in the section. In such a case the fact of the conviction by itself may be a sufficient justification for demanding security. It can also be made on conviction for any offence if the facts proved show that a breach of the peace took place in the commission of the offence or the taking place of such breach was probable and in the opinion of the Magistrate the facts are such as to make it necessary to call for security. Thus even in cases of conviction under sections 149, 153A, 154 I. P C. which are the offences of Chapter VIII of the Indian Penal Code, which are excepted in the opening part of the section, the facts may be such as to warrant the making of an order for security.

In all such cases in which the conviction is for an offence not expressly mentioned in the section there must be a special finding by the Magistrate of facts attracting the operation thereof

Expression "other offence involving a breach of the peace" as interpreted in reported cases.

During the long period the Code of 1898 has been in force considerable difficulty has been experienced in interpreting the words "offence involving a breach of the peace"

The expression "other offence" refers to offences *ejusdem generis* with the offences against public tranquillity and of assault mentioned in the section (*Kuppa Reddiar In re 47 Mad. 846*).

It has been held that an offence involving a breach of the peace means an offence into which breach of the peace necessarily enters as a constituting element and not merely an offence committed under circumstances that the accused did acts involving a breach of the peace (*Puttambi Moidum 19 M. L. J. 66*).

Breach of the peace must be a constituting element.

In other words offences involving a breach of the peace mean those in which a breach of the peace is an ingredient (*Arun Samanto 30 Cal. 366 ; Muthia Chetti 29 Mad. 190 ; Kuppa 47 Mad. 846 ; Kali 38 Cal. 156 ; Rajnarain 35 Cal 315 ; Abdulla 2 Lahore 279*) and not those provoking or likely to lead to a breach of the peace (*Arun Samanto 30 Cal. 366*).

In *Emperor* v. *Yakoob 43 Bomb. 554* it has been held by Heaton J. that the words cover at any rate two classes of cases the first class being where there has actually been a breach of the peace, the other class where the definition of the offence involves a breach of the peace. In the same case Pratt J. has held that the words include offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur.

Breach of peace must have taken place or must be involved in the definiti o of the offence.

In *Manik Rai* v. *Emp. 33 All. 771* it has been held that the word "involve" connotes the inclusion not only of a necessary but also of a probable feature, circumstance, antecedent condition or consequence. Where the offence is such an offence that it is as a matter of experience followed by a breach of the peace it is one which comes within the terms of Sec. 106.

Wider meaning.

Actual breach of the peace is not necessary to be proved (*Marimuthu Naidu 25 Cr. L. J. 139 ; Kuppa Reddiar In re 47 Mad. 846*).

It is enough if the offence brought home to the accused necessarily includes or implies a breach of the peace (*Kuppa Reddiar In re 47 Mad. 846*.

Immoral and indecent acts are not offences involving a breach of the peace (*Arun Samanto* v. *Emp. 30 Cal. 366*).

Immoral and indecent acts not offences involving breach of peace.

Mischief and Criminal trespass are also not such offences (*Baidyanath Majumdar* v. *Nibaran Gope 6 C. W. N. 471*).

Nor mischief and criminal trespass.

Making of an Order Discretionary with Court.

The making of an order for security is left to the discretion of the court which must exercise that discretion judicially. There may be cases in which the conviction is for an offence specifically mentioned in the section but still the facts are such as not to call for an order for security. The section is an enabling provision and the Magistrate is at liberty to invoke it when in his opinion an order under the section is necessary. There is no compulsion on the court to make an order in any case but it is imperative that the court should exercise its descretion whether to call for security or not even when it convicts the accused of an offence enumerated in Sec. 106.

Order for security should not be made where the effect of it would be to prevent the party against whom it is made from exercising his lawful rights.

Rioting is and has all along been one of the offences mentioned in Sec. 106, a conviction for which may justify an order for security but it has been held that when on the complainant trying to take possession of land in the occupation of the accused the latter used more force than was necessary to prevent the complainant's party from doing so the accused though rightly convicted of rioting should not be bound down under Sec. 106 to keep the peace, as that would have the effect of preventing the accused from resisting any further attempt by the complainant (*Nuhar Khan* v. *Emp. II C. W. N. 840*).

Similarly where the *ijaradar* of a market was convicted under Sec. 147 I. P. C. for exceeding his right under the law to prohibit stall-keepers from selling certain goods on order Sec. 106 was held to be bad (*Nanda Kumar Sarkar* v. *Emp. II C. W. N. 1128*).

In *Bepin Behary Guha* v. *Pranakul Majumder II C. W. N. 176* in which the conviction was under section 143 I. P. C.

it was held that an order under section 106 was justifiable but as it would have the practical effect of preventing the accused from taking possession of the property it was desirable that the other side should also be bound down under section 107 Cr. P. C.

Order when Justifiable in case of conviction for offence not specifically enumerated.

Necessity of clear finding as to facts making section applicable.

When the offence of which a person is convicted does not by itself and apart from any other incidents come within the terms of Sec. 106 the Magistrate should record a clear finding as to the facts which in his opinion make the section applicable (*Baidya Nath Majumdar* v. *Nibaran Chander Gope 30 Cal. 93 S. C. 6 C. W. N. 671.*

Insult intended to provoke breach of peace (sec 504 I. P. C.).

The offence of criminal intimidation is specially mentioned in section 106 but an offence under section 504 (insult intended to provoke a breach of the peace) is not and it has been held that a breach of the peace or probability of a breach of the peace is not an ingredient of an offence under section 504 I. P. C. and a conviction for such an offence by itself does not warrant an order for security (*Emp.* v. *Yakoob 43, Bomb. 534*).

Theft (section 379 I. P. C.).

A conviction under section 379 I. P. C. is not of itself sufficient to sustain an order under section 106 (*Chandra Bhuson Sen* v. *Emp. 7 Cal. L. J. 173 ; Kishore Sircar* v. *Emp. 8 C. W. N. 517*).

Such a conviction coupled with findings bringing the case within the scope of section 106 may sustain an order thereunder but in such a case the findings must be clear and explicit (*Kishore Sircar* v. *Emp. 8 C. W. N. 517*).

Where in such a case there is no finding that the accused committed an offence contemplated by section 106 although there may be evidence to that effect an order under section 106 is made without jurisdiction (*Kinoo Shekh 6 C. W. N. 678*)

Criminal trespass.

A person who enters another man's premises and uses violence to him and deprives him of his property commits a breach of the peace in

the wider sense of the expression and an order against him under section 106 is valid (*Savaraiula (Naidu In re. 19 Cr. L. J. 929*).

Wrongful confinement.

It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement and hence an order under section 106 is illegal where such an order is made on conviction under section 342 I. P. C. (*Muhammed Afzal* v. *Emp. 24 Cr. L. J. 271*).

Wrongful confinement *per se* is not an offence involving a breach of the peace but if the accused is found to have violently seized another person, tied his hands and wrongfully confined him in an open garden security can be ordered under section 106 (*Kuppa Reddiar In re. 47 Mad. 846*).

Hurt and grievous hurt.

Offences under sections 323 and 325 are offences involving a breach of the peace (*Chajja* v. *Emp. 19A. L. J. 856. S. C. 22 Cr. L. J. 668 ; Emp.* v. *Sheoram 24 Cr. L. J. 319*).

Where the accused was convicted under section 323 I. P. C. and the acts committed included an assault on a prosecution witness in a public place an order under section 106 requiring security is legal and it is not necessary that a finding should have been recorded that a breach of the peace was involved (*Ramswami Thevan 44 M. L. J. 485 S. C. 25 Cr. L. J. 455*).

Where the complainant was assaulted by one of the accused at the instigation of the others in the street without any provocation being given, the Magistrate is right in holding that the conduct of the accused was likely to cause a breach of the peace and an order for security under section 106 is legal. (*Nanha.* v. *Kanhayalal 25 Cr. L. J. 71*).

These cases proceed on the footing that an offence under section 323 I. P. C. is an offence involving a breach of the peace. But the more reasonable view seems to be that an order for security following a conviction for hurt or grievous hurt is justifiable only when circumstances are present which constitute a breach of the peace or are likely to lead to a breach of the peace.

In the absence of such circumstances an order for security following a conviction under section 325 was held to be unjustifiable (*Durga Bharati* v. *Emp. 24 Cr. L. J. 491*).

Under section 106 an order binding over an accused person can only be passed when in a case of causing simple hurt or assault a breach of the peace is involved. No hard and fast rule can be laid down but in the absence of a finding that the assault which took place involved a breach of the peace the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down. No one goes to assault his personal friends so that the mere fact of the assault necessarily involves the finding directly or indirectly that the parties are on bad terms (*Muhammad Rahim* v. *Emp. A. I R 1926, All 144.*

Accused if to be called upon to show cause before order is made.

The section does not lay down that the Magistrate is to call upon the accused to show cause before he makes the order for security but in *Subal Chandra Dey* v. *Ram Kanai Sanyasi 25 Cal. 628* it has been held that he should do so. If this is to be done at all it must be after the hearing is closed and before the judgment is pronounced for the order for security has to be made at the time of passing sentence.

It has also been held that not only is there any need to issue a preliminary notice to show cause against an order for security being made but the issue of such notice and passing an order subsequently after the passing of the sentence will make the order illegal.(*Ramadhin* v. *Emp. 21 A. L. J. 839*).

Amount of bond.

The amount of the bond must be proportionate to the means of the accused and is not to be determined merely regard being had to his condition in life and the circumstances of the case These were the guiding factors under the Codes of 1861 and 1872 but since 1882 these have been subordinated to the means of the accused for the purpose of determining the amount of the bond.

The provisions of Chap. VIII are intended not to be punitive but are preventive and it is not permissible to limit the security or the amount of surety to such descriptions that it is perfectly impossible for the accused to furnish them thus rendering it certain that they will be committed to jail (*Allabad v. Emp. 17 Sind L. R. 160*).

Power to reject sureties.

The law on the subject is contained in section 122 of the Code which contains the procedure to be followed in refusing to accept a surety offered or rejecting one already accepted on the ground that the surety is an unfit person for the purpose of the bond.

The section speaks of "a Magistrate" only. The expression "a Magistrate" cannot possibly include a Court of Session or a High Court which also may have occasion to pass an order under section 106.

The present section 122 has been substituted for the old one which spoke of a Magistrate refusing "to accept a surety offered under this chapter," *i.e.*, Chap. VIII of the Code and deals with the power of a Magistrate to refuse to accept "any surety" or reject one already offered.

The present section is not limited in its application to sureties offered under Chap. VIII but applies also to those offered under Sec. 562.

Section 122 occurs in Chap. VIII. under the heading "proceedings in all cases subsequent to order to furnish security" and the provisions of the sections of the Code under that heading apply equally to bonds under section 106 and section 118. It is curious therefore that section 122 should be so worded as to deal with the power of Magistrates only in the matter of sureties. Looking at the Code of 1882, section 122 was as follows—"A Magistrate may refuse to accept any surety for good behaviour offered under this chapter on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person." So far as good behaviour was concerned it could only

be provided for by Magistrates under section 108, 109, and 110. In cases of reference to the Sessions Judge in the Muffusil and the High Court in a Presidency Town, on the ground of the period of the bond being more than one year, although the final and operative order was that made by the Sessions Judge or the High Court as the case might be, it was the Magistrate who was to deal with the surety offered in pursuance of the order of the higher court. Therefore in describing the court it was only necessary to refer to "a Magistrate" in the section. The legislature decided to extend the power in question to cases of keeping the peace as well and in 1898 the words "for good behaviour" were omitted and the section was made to run as follows—"A Magistrate may refuse to accept any surety offered under this chapter on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person."

The mistake was committed in not altering the words "a Magistrate" to "the court". It was overlooked that the change made by omitting the words "for good behaviour" had the effect of making the section applicable to all cases of security including one under section 106 which authorised not only Magistrates but Courts of Session and High Courts to make the order for security.

There is no doubt that orders under section 106 are in the majority of cases made by Magistrates but the inconsistency is there and the oversight at the time of amending the Code in 1923 is to be regretted.

It is inconceivable that a Magistrate should have the power to refuse to accept a surety offered or reject one already accepted but not the Court of Session or the High Court which would be bound to accept a surety offered without the power to reject such surety at any future time but the words used by the legislature may lead to this conclusion.

The High Court in the exercise of its Ordinary Original Criminal Jurisdiction may have to make an order under section 106 and so far as sureties offered may be concerned it will be competent to deal with them, in any way which may be proper, by invoking its inherent powers, specially saved in the present

Code by section 561A, but the Court of Session will be helpless unless it too is at liberty to invoke an inherent power.

The other way of looking at the matter is that courts higher than those of Magistrates have full discretion in the matter of accepting or rejecting sureties untramelled by the necessity of holding an enquiry on oath as to the fitness of the surety. So far as Magistrates are concerned a restraint is placed on them in the matter of rejecting a surety already accepted or refusing to accept one offered inasmuch as they are under an obligation to hold an enquiry on oath as to the fitness of the surety and can make an adverse order only on the ground that the surety in question is unfit for the purposes of the bond.

Every court must be presumed to have the power to decide whether an order made by itself has been complied with or not and sufficiency or otherwise of a surety offered in obedience to an order for security must fall within the scope of such decision. Section 122 is a disabling section in this sense because it curtails the free exercise of the discretion of Magistrates in a particular matter and entails on them the necessity of exercising that discretion in a particular manner. So far as higher courts are concerned they are at liberty to exercise their power to see to the proper execution of their orders freely as they think proper. In this view a Court of Session or High Court in a case in which it makes an order for security under section 106 is not limited to the ground of unfitness for the purpose of the bond in rejecting or refusing to accept a surity, nor is it under any compulsion to hold an enquiry on oath. It can make an order of refusal to accept or of rejection on any other ground and without holding an enquiry on oath. This seems to be a reasonable view although the legislature should never have left the matter unsettled.

A reference to section 406A, which is a new provision added in 1923 lends support to the view that the legislature entirely overlooked the possibility of an order under section 106 being made by a court higher than that of a Magistrate and the necessity of the power of such court to reject a surety who may be an unfit person for the purposes of the bond.

Unfit for purposes of the bond.

This is the only ground for rejecting a surety. To set at rest the conflict of rulings as to the test of the fitness of a surety (pecuniary or otherwise) the legislature has now enacted that a surety may be rejected on the ground that he is unfit for the purposes of the bond. (See discussion later in connection with security for good behaviour).

Application by surety for discharge.

Any surety may apply for a discharge to a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class. Such Magistrate need not be the Magistrate who made the order for security but evidently a Magistrate in whose jurisdiction the person bound over is. The procedure to be followed by the Magistrate is laid down in sections 126, 126A of the Code.

Reference to superior Magistrate when the trying Magistrate has no power to make an order for security which however is deemed to be necessary.

Section 349 of the Code lays down the procedure to be adopted by a Magistrate of the second or third class when in the opinion of such Magistrate in a case tried by him an order under 106 should be made. In such a case the Magistrate should record his opinion and submit his proceedings to the District Magistrate to whom he is subordinate.

The time for making the reference is after the hearing of the evidence for the prosecution and the defence if in the opinion of the Magistrate the accused is guilty.

The Magistrate making the reference is not to pass sentence on the accused. He must refer the whole case to the superior Magistrate who will pass an adequate sentence as also an order under section 106.

The superior Magistrate to whom reference is made is competent to pass such judgment, sentence or order in the case,

as he thinks fit, and as is according to law; he can acquit the accused altogether if in his opinion the accused is not guilty.

The responsibility of deciding the whole case is shifted from the subordinate to the superior Magistrate and therefore he is competent in his discretion, to examine any witness who has already given evidence in the case and may call for and take any further evidence, in other words, he can reopen the whole case and try it *de novo*.

Where there are several accused, if in the opinion of the trying Magistrate an order under section 106 should be made against any one of them, he should forward all the accused, who are in his opinion guilty, to the superior Magistrate. In other words he is not at liberty to convict those against whom it is not necessary, in his opinion, to make an order under section 106. But he is quite competent to acquit those who in his opinion are not guilty. This is provided for in sub-section 1A which has been added to section 349 in 1923.

[*N.B.*—In amending the Code in 1923 the legislature has throughout followed the policy that in cases where there are several accused persons, if under any provision of the Code the case of any one of them goes before a higher court, the cases of all the others against whom an adverse order is proposed to be made must be referred to such court, although they cannot of their own right claim advantage of any special provision for carrying their cases to the higher court. (Sub-section 3A of section 123; sub-section 1A of section 349; section 415A].

Duty of Magistrate to whom case referred.

The superior Magistrate must make up his mind whether the accused is guilty or not and exercise his own independent judgment in the matter and write a judgment conformable to the requirements of section 367 of the Code (*Karuppia Pillai* v. *Emperor*, *1920 M. W. N. 120 S. C. 21 Cr. L. J. 52*).

He cannot merely pass the order under section 106 and send the case back to the subordinate Magistrate to deal with the substantive charge (*Dukhi* v. *Emp. 24 Cr. L. J. 784*).

Stage at which reference to be made.

It must be after hearing the evidence for the prosecution and the defence, *i.e.*, just at the time when the Magistrate is to determine what judgment he is to pass in the case.

Duty of referring Magistrate.

The referring Magistrate cannot himself pass the sentence and refer the case for action under section 106 only. (*Rahimuddin Howladar* v. *Emp.* 35 *Cal.* 1903).

Whole case to be referred.

The whole case goes to the superior Magistrate including the cases of those accused, where there are several, who should not in the opinion of the trying Magistrate be bound down. (sub-section 1A section 349).

Pass such order as he thinks fit.

The superior Magistrate cannot return the case to the referring Magistrate for disposal but must dispose of it himself. The provision in sub-section 2 of section 349 that the Magistrate to whom the proceedings are submitted may pass such orders as he thinks fit means that he may pass such final order disposing of the case as he thinks fit. (*Ponnusawmy Naidu* v. *Emp.* 36 470 *S. C.* 13 *Cr. L. J.* 16 ; *Emp.* v. *Thakur Dayal* 26 *All.* 344 ; *see also Q. E.* v. *Havia Tellapa* 10 *Bomb.* 196).

Power of District Magistrate (and the Chief Presidency Magistrate in a Presidency Town) to discharge a person imprisoned for failure to give security and to reduce the amount or the period of the bond.

This is provided for in section 124 of the Code. (See note on the subject in connection with security for good behaviour).

Power of District Magistrate (and the Chief Presidency Magistrate in a Presidency Town) to cancel a bond in cases in which security has been furnished.

This is provided for in section 124 of the Code. (See note on the subject in connection with security for good behaviour).

If a Magistrate not empowered by law in this behalf cancels a bond his proceeding shall be void.

This is provided for in Cl. (*f*) of section 530 of the Code. (See note in connection with security for good behaviour).

Appeal and powers of Appellate Court.

The right of appeal is exercisable only when it is expressly conferred by the Code. There is no right of appeal under the Code consequent on the order for security. The right of appeal is dependent on the conviction.

No sentence which would not otherwise be appealable shall be made so merely on the ground that the person convicted is ordered to find security to keep the peace (section 415). The order for security is not appealable by itself, whatever the amount of security demanded or the period of the bond. Under the Code there is no appeal in certain cases, for example, in cases in which a Magistrate of the first class, passes a sentence not exceeding fifty rupees. An order under section 106 may be made on conviction for any offence under Chapter VIII except those under sections 143, 149, 153A, 154 I. P. C. An offence under section 160 (committing affray), for example, is an offence conviction for which by itself may justify an order for security under section 106. The maximum punishment for committing affray is imprisonment for one month or fine of one hundred rupees or both. In such a case tried by a Magistrate of the first class a fine of Rs. 50 may in many cases be an appropriate sentence and it may be followed by an order under section 106. There is no appeal in such a case because under section 413 there is no appeal in a case in which a Magistrate of the first class passes a sentence of fine not exceeding fifty rupees.

The order for bond cannot stand irrespective of the conviction and if the conviction is set aside on appeal the bond taken under the section becomes void.

The Appellate Court may also maintain the conviction but set aside the order for bond for it may make any amendment or consequential order in connection with the bond (section 423).

The Appellate Court may in affirming the conviction in any case make an order under section 106 when no such order was made by the court which convicted the accused. This will not amount to enhancement of sentence under Cl. (*b*) of sub-section 1, of section 423.

The Appellate Court may make an order under the section in a case in which the conviction was by a Magistrate who had no power to make an order under section 106. In other words the District Magistrate in an appeal against a conviction by a Magistrate of the second and third class may himself make an order under section 106 (sub-section 3, section 106).

There was great controversy as to whether the Appellate Court had power to make an order for security when the court which convicted the accused was not empowered to do so. To set this at rest the legislature has now added the words "including a court hearing appeals under section 407" (*i.e.*, in appeals from sentences passed by Magistrates of the second and third class who cannot make an order under section 106).

A Magistrate of the second or third class may under section 349 forward a case to a Sub-Divisional Magistrate of the second class reporting the desirability of an order under section 106. Against the conviction and order for security by such Sub-Divisional Magistrate an appeal will lie to the District Magistrate (section 407).

An order made by a Magistrate refusing to accept a surety or rejecting one already accepted is appealable in the manner laid down in section 406A of the Code.

Reference to Sessions Judge and High Court under section 123.

Sub-section 2 of section 123 deals with a case when "such person" has been ordered to give security for a period exceeding one year. "Such person" means a person mentioned in sub-section 1, and is one who has been ordered to give security under section 106 or section 118, *i.e.*, any one against whom an order for security has been made, whether on conviction or otherwise, for keeping the peace or for good behaviour.

The Magistrate making the order for security shall in such a case issue a warrant directing the accused to be detained in prison pending a reference to the Sessions Judge in the Muffassil and to the High Court in a Presidency Town. This the Magistrate has to do irrespective of whether the accused is undergoing a substantive sentence of imprisonment in consequence of a conviction for an offence or suffering imprisonment in default of payment of fine to which he has been sentenced on conviction or the sentence is one of fine only and that fine has been paid.

Under sub-section 3A of section 123, if there are several accused persons, and if in respect of any one of them a reference has to be made to a higher court, the cases of all the other accused have to be submitted to the higher court which will make such order in respect of all the accused as it thinks proper.

There is no appeal against an order for security only, the right of appeal being dependent on the conviction for the substantive offence. When the order for security has been made by a Magistrate of the first class before whom the conviction was had and the sentence is appealable and the period of the bond is more than one year and the security is not furnished there is an appeal to the Sessions Judge to whom a reference under section 123 is also compulsory. In such a case it is the same tribunal who is to examine the matter whether on appeal or reference. But there may be cases in which the sentence inflicted is not appealable but the period of the bond is more than one year. In such a case there is no appeal but a reference under section 123 has to be made in the matter of security to the Sessions Judge. It may be that the conviction and the order of security is by a Sub-Divisional Magistrate who is a Magistrate of the second class. Against a conviction and sentence had before him there is an appeal to the District Magistrate. Such a Sub-Divisional Magistrate might have made an order for security for more than one year and if that is so a reference has to be made to the Sessions Judge. Thus in such a case there is an appeal to the District Magistrate who in deciding the appeal can interfere with the conviction as also with the order for security.

On the reference the Session Judge can interfere with the order for security in any way he likes though not with the conviction in respect of which the matter is not before him. The order for security is thus before two courts the District Magistrate and the Sessions Judge. Even if the accused feels aggrieved by the order for security alone he must file an appeal to the District Magistrate although the matter of security which alone he wishes to be examined by a higher court is before the Sessions Judge for otherwise he will be confronted with the difficulty, in case he moves the High Court, created by sub-section 5 of section 439, under which where an appeal lies and no appeal is brought no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The right of appeal in cases of orders under section 106 being dependent on the substantive conviction it comes to this that there is provision for appeal against orders for security made under section 106 in all cases in which the sentence inflicted for the substantive offence is appealable. That being so whenever the sentence for the substantive offence is appealable an appeal must be preferred in order to be entitled to move the High Court in revision.

Thus in a case decided by a Sub-Divisional Magistrate who is a Magistrate of the second class in which the accused is convicted of an offence contemplated by section 106 and an order under that section is made for furnishing security for keeping the peace for a period exceeding one year and the security is not furnished an appeal has to be preferred to the District Magistrate under section 407 of the Code who will come to his own conclusion both in respect of the conviction and the order for security and the Sessions Judge to whom the District Magistrate is subordinate will also come to his own conclusion as to the order for security under sub-section 3 of section 123 which makes a reference imperative.

This anomaly has been overlooked by the legislature in amending the Code in 1923 when the anomaly of a like nature in connection with appeals and references in cases of security for keeping the peace otherwise than on conviction and for good behaviour was rectified by the amendment of section 406

which now allows an appeal to the Sessions Judge in all cases of security for keeping the peace and for good behaviour alike (instead of an appeal to the District Magistrate in cases of good behaviour only and none in cases of keeping the peace) except in cases where the proceedings have to be submitted to the Sessions Judge under section 123.

The remedy is to add a proviso to section 407 to the effect that the appeal will lie except in cases where in consequence of an order for security for keeping the peace under section 106 for more than one year a reference has to be made to the Sessions Judge under section 123 in which case the reference will include the examination of the legality and propriety of the conviction as in an appeal.

Revision.

The High Court in revision may make an order for security even if the court which convicted the accused did not make any such order (sub-section 3, section 106).

The High Court in revision may exercise all the powers of an Appellate Court.

The High Court in revision may interfere with an order under section 122 refusing to accept or rejecting a surety already accepted.

CHAPTER V.

PREVENTIVE MEASURES ON CONVICTION OTHER THAN SECURITY TAKEN UNDER SECTION 106 OF THE CODE.

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The special provisions in the Code of Criminal Procedure regarding youthful offenders (section 399), first offenders generally (section 562), and previously convicted offenders (section 565) have in view the prevention of offences which is also the object of the Reformatory Schools Act. Acts passed by the Provincial legislatures like the Bengal Children Act have the same object as the Reformatory Schools Act and are meant to improve upon it by making provisions best suited to local conditions.

Heavy sentences used to be favoured very much at one time as likely to have a deterrent effect on the offender concerned as also on others but the justification for and the utility of such sentences are doubted by modern jurists and justice tempered with mercy is now the guiding principle and it is believed that by so administering the criminal law the chances of reforming a criminal are greatly increased. It is one step further in the practical application of the theory of reformation not to inflict any punishment at all nor to put any restraint on a person convicted of an offence but just to admonish him or to ask him to give an undertaking to appear and receive sentence whenever called upon by the Court to do so. It is a matter of common knowledge that contact with hardened criminals contaminates an offender who finds himself in jail for the first lapse in his life of a kind which is made punishable by law and moral pulpits for first offenders generally and specially for juvenile offenders are now a matter for greater consideration than prisons.

Confinement of youthful offenders in reformatories.

399. (*1*) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for

any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

Section 399 Criminal Procedure Code.

Provision for the detention of youthful offenders in reformatories was made in the first Code of Criminal Procedure that was passed in 1861 (section 433). Section 318 of the Code of 1872 and section 390 of the Code of 1882 were the corresponding sections. In all the three Codes a person under the age of sixteen years sentenced by any criminal court to imprisonment was contemplated. In 1876 the first Reformatory Schools Act was passed. The law was the same in all the three Codes. Section 399 of Act X of 1882 was as follows—When any person under the age of sixteen years was sentenced by any criminal court to imprisonment for any offence the court might direct that such person instead of being imprisoned in a criminal jail should be confined in any reformatory established by the Local Government as a fit place for confinement in which there are means of suitable discipline and of useful industry or which was kept by a person willing to obey such rules as the Local Government might prescribe with regard to the discipline and training of persons confined therein. This section was in-

consistent with the provisions of the Reformatory Schools Act in that it authorised any criminal court to take action thereunder whereas under the latter, besides higher courts, a magistrate could make an order sending a youthful offender to a Reformatory School if specially empowered in this behalf by the Local Government. In 1897 the Reformatory Schools Act of 1876 was repealed and in 1898 Act V of that year was passed as the Code of Criminal Procedure which superseded that of 1882 and by sub-section 3 added to section 399 it was made inapplicable to any place in which the Reformatory Schools Act of 1897 was for the time being in force. The age limit was reduced from "under sixteen" to "under fifteen." No change has been made in section 399 in 1923.

Section 399 Criminal Procedure Code contemplates—

(*a*) a person under the age of fifteen years male or female.

(*b*) conviction of such person for any offence by any court and a sentence of imprisonment.

(*c*) confinement in reformatory instead of incarceration in jail.

The Reformatory Schools Act.

(*N.B.—See Appendix where the Act is printed in extenso*).

Under section 4 of the Reformatory Schools Act a youthful offender means a boy who has been convicted of any offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of fifteen years.

It contemplates (*a*) only a boy under the age of fifteen years (*b*) conviction of an offence punishable with transportation or imprisonment.

A reformatory school must among other things provide the means of giving youthful offenders industrial training (section 6, Cl. C.).

Under section 8 such youthful offender may be detained in a reformatory school—the period of detention not to be less than three or more than seven years. The provisions under the Act dealing with detention in a reformatory school are different

from those of section 399 in that they exclude a female offender, include a sentence of transportation, specify a time limit for the detention and cannot be made by all magistrates. Detention in a reformatory school under the Act is in lieu of imprisonment or transportation and under section 399 it is in lieu of imprisonment only. The object of laying down the minimum period of detention is to achieve the object for which the Act has been passed, *viz.*, to give youthful offenders industrial training which necessarily must take some time. The object of fixing the maximum is also the same. The youthful offender is given an industrial training for which the period of seven years is considered to be amply sufficient and when he is discharged he must be considered to be a good citizen expected to earn his living honestly in this world and he must be given a free scope for carrying on a vocation for which he has qualified himself.

No person can be detained in a reformatory school after he is eighteen and he must be less than fifteen when the conviction takes place. Thus the inevitable minimum in the case of a youthful offender of the maximum age is three years.

Nothing is an offence which is done by a child under seven years of age (section 82 I. P. C.) and nothing is an offence which is done by a child above seven years of age and under twelve who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion (section 83 I. P. C.). The youngest offender who can be held responsible for his conduct may be detained only for seven years and not necessarily up to the age of eighteen. Detention in a reformatory school is not intended for those who are not responsible for their acts but it is a substitute for imprisonment in the cases of those who though fully responsible for their acts should be treated in a special manner, in view of their age which makes it possible for the state to reclaim them and make them good citizens.

The period of three to seven years may be regulated according to the age or other considerations of the offenders by the Local Government by rules framed for the purpose (section 8 (3) (*b*)).

Under section 10 of the Reformatory Schools Act (VIII of 1897) an officer in charge of a prison in which a youthful offender is confined in execution of a sentence of imprisonment may bring him, if he has not attained the age of fifteen years, before the District Magistrate within whose jurisdiction such prison is situate and such magistrate may, if the youthful offender appears to be a proper person to be an inmate of a reformatory school, direct that instead of undergoing the residue of his sentence he shall be sent to a reformatory school and there detained for a period which shall be subject to the same limitations as prescribed by or under section 8 of the Reformatory Schools Act with reference to the period of detention thereby authorised. Officers in charge of prisons are thus given power to take steps for setting things right, when in their opinion some thing has not been done which should have been done. Under the Prisoners Act (III of 1900) such officers have generally in all cases power to bring to the notice of the Local Government illegalities in connection with orders under which any person is to be detained in prison. Section 17 of that Act provides that where an officer in charge of a prison doubts the legality of a warrant or order sent to him for execution or the competency of the person whose official seal or signature is affixed thereto to pass the sentence and issue the warrant or order he shall refer the matter to the Local Government by whose order on the case he and all other public officers shall be guided as to the future disposal of the prisoner.

It is imperative, that before directing a youthful offender to be sent to a reformatory school, the Court before which he is convicted or the District Magistrate before whom a youthful offender under the age of fifteen is produced by the officer in charge of a prison should enquire into the question of his age and after taking such evidence, if any, as may be deemed necessary, shall record a finding thereon stating his age as nearly as may be (section II, sub-section I). A similar enquiry has to be made and finding recorded by every Magistrate under the Act before submitting his proceedings and forwarding the youthful offender to the District Magistrate (section II, sub-section 2).

Under section 16 of the Act nothing contained in the Code of Criminal Procedure shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender or the substitution of an order for detention in a reformatory school for transportation or imprisonment. The provisions of the Reformatory Schools Act considered above all deal with male youthful offenders and with the detention of such offenders in reformatory schools but section 31 of the Act gives power to courts to deal with youthful offenders both male and female in a more lenient manner, *viz.*, (*a*) by discharging the offender after due admonition, (*b*) by delivering the offender to his or her parent or guardian or nearest adult relative, on such parent, guardian or relative executing a bond, with or without sureties as the court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months. For the purposes of this section the meaning of "a youthful offender" has to be gathered by reading clause (*a*) of section 4 and sub-section 2 of section 31 together. Thus the expression means a boy or a girl, convicted of any offence punishable with transportation or imprisonment, who at the time of such conviction is under the age of fifteen years.

The provisions in the Code of Criminal Procedure relating to the forfeiture of bonds and such other matters do not apply to bonds aforesaid and no procedure is laid down in the Act itself. The bond is for being responsible for the good behaviour of the youthful offender in question for twelve months or less, as the court may fix. It may be with or without sureties.

When a youthful offender during his period of detention in a reformatory school is again convicted by a criminal court the sentence of such court shall commence at once, notwithstanding any thing to the contrary in section 397 of the Code of Criminal Procedure but the court shall forthwith report the matter to the Local Government which shall have power to deal with the matter in any way in which it thinks fit (section 32).

Courts before which a youthful offender detained in a reformatory school is convicted have thus a duty cast upon them

to forthwith report the fact of the conviction to the Local Government.

Case Law.

An order under the Reformatory Schools Act cannot be made in respect of a youthful offender unless and until a definite sentence of imprisonment is passed against him. Where no definite sentence of imprisonment is passed but only an order for detention in a reformatory school the order is invalid. (*Emp.* v. *Bakhtawar 12 Cr. L. J. 50*).

An order cannot be made in default of payment of fine to which alone the offender is sentenced. (*Nga-Po. Yok.* v. *Emp. 12 Cr. L. J. 244*).

A sentence of detention for a period of five years or in the alternative until the accused attains the age of eighteen is bad. (*Emp.* v. *Rama Sudama 15 Bomb. L. R. 306 S. C. 14 Cr. L. J. 256*).

A Magistrate not empowered to act under section 8 of the Reformatory Schools Act should after convicting the accused submit the case to the District Magistrate for passing a sentence and an order under section 9 (2) if necessary. The case should not be sent to the Magistrate to whom the trying Magistrate is immediately subordinate. (*Kamkeyya* v. *Emp. 11 Cr. L. J. 32*).

Under section 16 of the Reformatory Schools Act an order substituting detention in a reformatory for imprisonment cannot be interfered with in appeal but this does not preclude an appelate court from altering the sentence of imprisonment to one of whipping. When the order of imprisonment is altered to one of whipping the order of detention in a reformatory falls to the ground. (*Emp.* v. *Rajabali 5 S. L. R. 173 S. C. 13 Cr. L. J. 44*).

The Bengal Children Act (II, B. C. of 1922).*

(*N.B.—See Appendix where the Act is printed in extenso*).

Provincial legislature has in places superseded the Refor-

*Note :—The Act at present applies only to the town and suburbs of Calcutta and the Municipality of Howrah.

matory Schools Act. In Bengal, for example, it has been replaced by the Children Act (II, B. C. of 1922 amended by Act V, B. C. of 1923). It provides for sending youthful offenders to reformatories or industrial schools instead of prisons, for sending neglected children to industrial schools, for the trial of children and young persons in special courts and makes other special provisions about youthful offenders.

Under the Act a "young person" means a person who is fourteen years of age or upwards and under the age of sixteen years, a "youthful offender" means any person who has been convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of sixteen years and a "child" means a person under the age of fourteen years (Sec. 3).

The Act provides that notwithstanding anything to the countrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment or committed to prison in default of payment of a fine or in default of furnishing security.

A young person may be sentenced to imprisonment or committed to prison only when the Court certifies that he is of so unruly or so depraved a character that he is not a fit person to be sent to a reformatory school and that none of the other methods in which the case may legally be dealt with is suitable. (Sec. 21).

The Act authorises a court to send a youthful offender to a reformatory school on conviction of an offence punishable with transportation or imprisonment, to send a young person to such reformatory school on failure to give security under Sec. 106 or Sec. 118 Cr. P. C.

The Act also authorises a court to discharge a youthful offender after admonition only or to commit him to the custody of his parent or guardian or any relative.

The Act further provides that notwithstanding anything contained in any other law the conviction of a child or young person shall not be regarded as a disqualification attaching to a conviction of an offence under such law.

The provisions of Chap. XLII of the Code of Criminal Pro-

cedure 1898 shall, so far as may be, apply to bonds taken under the Act. (Sec. 46).

FIRST OFFENDERS.

Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment.

562. (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour:*

Conviction and release with admonition.

(1*A*) In any case in which a person is convicted *of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment, and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the*

offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(2) *An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision.*

(3) *When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:*

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) *The provisions of sections 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.*

Principle underlying release of offender on probation of good conduct.

Provision has been made in the Code of Criminal Procedure for dealing with first offenders as leniently as possible. The idea is to avoid the contamination by hardened criminals, the baneful effect of which on society at large when the subject of contamination is liberated from jail is very great.

The State punishes a person who has committed an offence only with a view to prevent the commission of crime in future. There being no element of vengeance in punishment it is immaterial whether an offender is put to any suffering or not if the only object of punishment, *viz.*, prevention of crime can be secured in any other way. The advantage of securing prevention of crime otherwise than by punishing the offender is manifold. The convicted man does not come under the evil influence of jail-birds, who have no ideas of morality, honesty and decency, and is not lost to the State or to his family. The State is relieved of the burden of maintaining him in prison, on the other hand if he reforms himself answering to kindness he becomes, it is a matter of common knowledge, even better than what he was previous to his delinquency. Prevention of crime is thus better secured than if he were sent to jail for not only will he avoid the course the reprehensible nature of which is now apparent to him but he is likely to exert his influence to prevent others from swerving from the right path of a citizen. The foundation of all legislation to release offenders on probation of good conduct or to deal with them even more leniently and to let them off with admonition is to avoid the contamination which is inevitable in the company of criminals who are always a menace to law and order and the swelling of whose ranks is calamitous to the body politic.

Provision in the Code of 1898.

The provisions of the English First Offenders Act were introduced into the law of this country for the first time in the year 1898 in section 562 of the Code of Criminal Procedure.

It was meant for youthful offenders and provided that on conviction of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code, punishable with not more than two years' imprisonment, the accused might instead of being sentenced to any punishment be released on probation of good conduct on his entering into a bond, with or without sureties, to appear and receive sentence, during a period not exceeding one year, when called upon by the court, and in the meantime to keep the peace and be of good behaviour, if in the opinion of the court such release was expedient having regard to the "youth character and antecedents of the accused, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed." All the aforesaid considerations taken together and not any one or some of them could justify an order which could be made only in cases of conviction for the four offences specifically mentioned and any other offence punishable with two years' imprisonment or less.

The scope of the section was very limited. It was intended to be invoked on conviction for certain offences only in favour of youthful offenders and not to operate generally in all cases.

Although section 562 of the Code of Criminal Procedure was not applicable an order of release on recognisance was made in a case generally known as the Khulna Gang case in which a number of persons were placed on their trial before a special tribunal of the High Court consisting of Jenkins C. J. Mukerji and Casper J. J. on a charge under section 400 I. P. C. of being persons associated for the purpose of committing dacoity. In this case the accused, except one against whom a *nolle prosequi* was entered, pleaded guilty to the charge and at the suggestion of the crown they were released on their entering into bonds to appear and receive sentence when called upon and to be of good behaviour and keep the peace in the meantime. So far as appears from the report (15 C. W. N. 151 N.) there was no limit of time in the bond under which the accused agreed to appear and receive sentence when called upon and to be of good behaviour and to keep the peace in the meantime—the bond was to operate for all time to come. The order in the

case could not have been made under section 562 but must have been made in the exercise of the inherent power of the High Court which has now been specially saved by section 561A inserted in the Code in 1923; or it may be taken to be an instance of the exercise of the Common Law Powers of the High Court which it has inherited as the successor of the Supreme Court.

When section 562 Cr. P. C. should be invoked.

The section is intended to be applied to cases where the offenders without being persons of depraved character may have succumbed to sudden temptation. (Emp. *v.* Sujan Sing 35 I. C. 486).

In exercising the special power under section 562 the danger to the public and to the accused himself have to be guarded against. If the offence indicates not mere thoughtlessness but criminality also such as a combination of design, ingratitude and a general character of craft and deceit, resort should not be had to the powers under the section. (*Daryalal* v. *Emp. 1925, 25 Cr. L. J. 1224*).

No previous conviction proved.

The section is intended primarily for first offenders but the words used "and no previous conviction is proved against him" seem to preclude the idea of an inquisition into the past conduct of the accused. If a previous conviction against an accused is proved at the trial it no doubt is a technical bar to an order under section 562 but if no such conviction is proved and an order under section 562 is passed a subsequent discovery of a conviction of this type is no ground to interfere in revision. (*Emp.* v. *Partab Narayan 26 Cr. L. J. 1278*).

Amendment of 1923: "age, character or antecedents" instead of "youth, character and antecedents."

The law on the subject has been thoroughly overhauled and the new section 562 as enacted in 1923 authorises the Court to make an order under the section whenever the expediency

thereof will be apparent to the Court regard being had to the "age, character or antecedents of the offender and the circumstances in which the offence was committed".

The change from "youth, character and antecedents of the offender" gives the section wider scope and makes it applicable to delinquency committed both in youth and old age.

A first offender whose misfortune it is to break the law in old age with a long and unblemished record behind could not be dealt with under section 562 of the Code of 1898 but now the section embraces him as well.

Formerly youth, character and antecedents had to be taken together but now age, character or antecedents in conjunction with the circumstances in which the offence was committed can determine the issue.

Law is no respecter of persons but the terms of section 562 are wide and character and antecedents of an accused may be taken into account. (*Emp.* v. *Partab Narayan 26 Cr. L. J. 1278*).

"Circumstances" instead of "extenuating circumstances."

"Extenuating circumstances" and "circumstances" in which an offence may be committed must mean the same thing, the latter must mean the former.

Section no longer confined to trivial offences.

It is no longer the trivial nature of the offence which is one of the guiding factors but the section may be applied on conviction for any offence punishable with imprisonment for not more than seven years when the offender is twenty-one years of age or upwards and on conviction for any offence not punishable with death or transportation for life when the offender is under twenty-one years of age or is a woman who may be of any age.

Maximum period of bond three years instead of one.

The bond may be with or without sureties and for appearing and receiving sentence when called upon to do so and for

keeping the peace and being of good behaviour. The maximum period of the bond is now three years, formerly it was only one.

Conviction and release with admonition in trivial cases.

Under sub-section 1A of section 562 added by Act XXXVII of 1923 subsequently to the amendment of the Code by Act XVIII of the same year provision has been made for the release of convicted persons with admonition only. But this admonition in lieu of punishment can be administered not in all cases in which the offender may be released on probation of good conduct but in those cases in which such release could be ordered under the Code of 1898 *viz.*, when the conviction is for theft in a building, dishonest misappropriation, cheating or any offence under the Indian penal Code punishable with not more than two years' imprisonment and in making the order regard is to be had to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed. This is similar to the provision of section 31 of the Reformatory Schools Acts. It must be borne in mind that when an accused is let off with admonition only he is convicted of an offence all the same. It is open to him to move the High Court in revision against the conviction and the order of admonition. The case of the Editor of the *Dainik Basumati* reported in 31 C. W. N. 168 is an instance where the High Court interfered with the order of admonition made by the Magistrate.

Sub-section 1A if governed by the proviso.

Sub-section 1A was added by Act XXXVII of 1923 to the present section 562 which was substituted for the old section by Act XVIII of 1923. Section 4 of Act XXXVII of 1923 expressly added sub-section 1A after sub-section 1 of section 562 and it must be taken to be governed by the proviso. It has however been held that the proviso to sub-section 1 of section 562 must be read as a part of that sub-section. It is

superseded as regards the effect of sub-section 1A by the words "the court before whom he is convicted" in the aforesaid sub-section and cannot be used so as to control those words (*Murlidhar* v. *Mahboob Khan 47 All. 353 s. c. 26 Cr. L. J. 624*). This view is hardly tenable and the Bombay High Court has held that the proviso is applicable to the whole of section 562 including the newly added sub-section 1A, (*Emp.* v. *Ranachhod Harjiwan 27 Bomb. L. R. 1019 S. C. 26 Cr. L. J.*).

Conditions as to abode of offender.

The court before directing the release of an offender under section 562 shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions (section 564).

Effect of an order under section 562.

A person released under section 562 stands exactly in the same position as a person convicted of an offence and punished in the ordinary way so far as his capacity to give evidence is concerned.

Three persons were tried jointly for burglary and convicted. One of them who admitted his guilt was dealt with under section 562. On appeal by the two others the Appellate Court remanded the case for further evidence and relied upon the evidence of the accused who had been dealt with under section 562 and examined as a witness. It was held that the examination of the accused dealt with under section 562 after he had made a full confession of his guilt and been convicted was not warranted by law. (*Dulla* v. *Crown 7 Lahore 148*).

Procedure for magistrates of the second and third class.

The proviso governs both sub-section I and sub-section IA.

A magistrate of the third class cannot make an order under section 562. A magistrate of the second class may be

invested by the Local Government to make orders as to first offenders under section 562.

When a magistrate of the third class or a magistrate of the second class not specially empowered by the Local Government is confronted with the necessity of an application of the section he is to record his opinion to that effect and submit the proceedings to a Magistrate of the first class or Sub-Divisional Magistrate forwarding the accused to or taking bail for his appearance before such Magistrate who shall dispose of the case in the manner provided for in section 380 (*i.e.*, pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and if he thinks further enquiry or additional evidence on any point to be necessary he may make such enquiry or take such evidence himself or direct such enquiry or evidence to be made or taken).

Under section 349 proceedings have to be submitted to a District Magistrate or Sub-Divisional Magistrate and under the proviso to section 562 to a Magistrate of the first class or Sub-Divisional Magistrate. Power to make an order under section 562 is one of the ordinary powers of a Magistrate of the first class as also of a Sub-Divisional Magistrate be he even a Magistrate of the second class.

The Magistrate to whom the proceedings are submitted may release the accused on probation of good conduct or with admonition only or may pass on him sentence according to law. He may also acquit the accused if on perusal of the evidence he comes to the conclusion that there should be no conviction.

The referring Magistrate has to record his opinion as to whether the powers conferred by section 562 should be exercised in respect of the person convicted by him. He must himself convict the accused for it is on conviction that the question can arise whether a sentence should be passed or the accused treated as a first offender.

Default in furnishing security.

If the Court directs the accused to enter into a bond with sureties and the sureties are not furnished what is the Court to do?

In cases of orders under Chapter VIII of the Code it is provided in section 123 sub-section I that in such case the person ordered to furnish security shall be committed to prison but section 123, specifically applies only to sections 106 and 118 and not to section 562 (*Nasu Meah* v. *Emp. 2 Rang. 360*) and there is no specific provision in connection with default to furnish security demanded under section 562. The order under section 562 is in lieu of punishment and if the order cannot be availed of by the accused it follows that the Court is to revert to the ordinary method of passing sentence on the accused.

Where the High Court in appeal made an order under section 562 in lieu of the sentence passed but the security required could not be furnished it was held that the case should be dealt with as if the accused had been released by the Magistrate himself on probation of good conduct and there was default in furnishing security (*Badsha in re. 26 Cr. L. J. 683*).

Appeal and powers of appellate Court.

An order under section 562 whether under sub I or IA can be made only on conviction. It is in lieu of the sentence which but for the special provision is to follow the conviction.

The provisions relating to appeals are to be found in Chap. XXXI of the Code. Under section 408 any person convicted on a trial by an Assistant sessions Judge, a District Magistrate or other Magistrate of the first class may appeal to the Court of Session and under section 410 any person convicted on a trial held by a Sessions Judge may appeal to the High Court. The only exception to this general rule is that there shall be no appeal in cases where a Court of Session passes a sentence of fine not exceeding fifty rupees (section 413). The exception has no application to a case in which an order under section 562 is passed for in such a case no sentence is passed at all.

Appeal to High Court.

So whenever an order under the section is made by the Sessions Judge or Additional Session Judge an appeal lies to

the High Court (See *Bahadur Molla* v. *Ismail 52 Cal. 463 S. C. 29 C. W. N. 151*).

Appeal to Court of Session.

Whenever an order under the section is made by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class the person convicted and so dealt with may appeal to the Court of Session. When a Magistrate not empowered to make an order under section 562 makes a reference to a Magistrate of the first class and the accused is either sentenced or dealt with as a first offender under sub-section I or IA of section 562 there is an appeal to the Court of Session

Appeal to District Magistrate.

When such reference is made to a Sub-Divisional Magistrate who is a Magistrate of the second class and the accused is either sentenced or dealt with as a first offender either under sub-section I or IA of section 562 by such Sub-Divisional Magistrate there is an appeal to the District Magistrate.

No appeal when order made by a Presidency Magistrate.

If the order under section 562 whether made under sub I or IA is made by a Presidency Magistrate there is no right of appeal to the High Court for a person convicted on a trial held by a Presidency Magistrate may appeal to the High Court only if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees (section 411) ; such right of appeal has been given to all persons ordered to furnish security under section 118 of the code (section 406).

In a case dealt with under section 562 then is no sentence at all and therefore right of appeal which is dependent on the sentence is *non est.*

Under section 413 the sentence curtails the right of appeal and there being no sentence in a case dealt with under section 562 there is no curtailment of the right of appeal whereas under section 411 it is the sentence which gives the right of appeal and there being so sentence there is no right of appeal.

Why orders should be appealable.

As to section 413 it may appear inconsistent that there should be no appeal when a person is sentenced to imprisonment for one month or a fine of fifty rupees but that there should be one where no sentence is passed but the accused is let off on probation of good conduct. In the first place the statutory deprivation of a general right of appeal must always be construed strictly (*Bahadur Molla* v *Ismail 52 Cal. 463 S. C. 29 C. W. N. 151*) and in the second place a bond for keeping the peace and for being of good behaviour for a period which may extend to three years may fairly be considered to take out a case from the category of petty cases and it is only proper that there should be a right of appeal given to a person executing such a bond. This is consistent with the general policy of the Code which has now made all orders for security under Chap. VIII appealable.

Right of appeal how affected when one of several accused dealt with as a first offender.

When there is an appeal on behalf of a convicted person against whom an order under section 562 was made, by the operation of section 415A there is a right of appeal in the other persons convicted with the former (*Bahadur Molla* v. *Ismail 52 Cal. 463 S. C. 92 C. W. N. 151.*

Power of Appellate Court and of the High Court in revision.

An order under the section may be made by an appellate court or by the High Court in revision in lieu of the sentence passed by the court of first instance which convicted the accused but which did not think it expedient to release him on probation of good conduct but it is the High Court alone which in appeal or revision can set aside an order dealing with an accused as a first offender and in lieu thereof pass sentence on him according to law (sub-section 2 and 3 of section 562). This provision of law contained in the present Code is rather peculiar. Reference may be made to section 16 of the Reformatory Schools Act which bars the revision by any court of an order of detention in a reformatory so as to substitute imprisonment for it.

In the matter of sureties the court may refuse to accept any surety offered or may reject any surety previously accepted by it on the ground that such surety is an unfit person for the purpose of the bond. But before making the order the court has to make an enquiry or cause it to be held as provided for in section 122. Such orders are appealable under section 406 A (sub-section 4 of section 562).

Section 122 deals with the power of Magistrates only to deal with sureties and the procedure to be followed by them. Sub-section 4 of section 562 makes section 122 applicable to sureties offered in pursuance of an order under section 562 irrespective of the court which made the order so that the difficulty involved in the administration of section 122 in relation to sureties offered in pursuance of an order under section 106 made by the Court of Session or High Court is not present in the matter of a surety offered in obedience to an order made by a Court under section 562.

Failure to observe conditions of recognizance.

Section 563—(1) If the Court which convicted the accused or a court which could have dealt with the offender in respect of his original offence is satisfied that the offender has failed to observe any of the conditions of his recognizance it may issue a warrant for his apprehension.

(2) An offender when apprehended on any such warrant shall be brought forthwith before the court issuing the warrant and such court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may after hearing the case pass sentence.

Conditions of recognizance.

Those are (1) to appear and receive sentence when called upon during the period stipulated in the bond (which cannot exceed three years in any case) (2) to keep the peace (3) to be of good behaviour.

Courts which may take action under section 563.

The Court which convicted the offender and released him under section 562 instead of inflicting sentence on him or a Court which could have dealt with the offender in respect of his original offence.

Action which may be taken.

The court taking action may issue a warrant for the arrest of the offender.

Condition precedent to taking action.

The court which is to take action must be satisfied that there has been a breach of one or other of the conditions of the bond.

Subsequent to arrest.

Where the offender is arrested and produced before the Court which issued the warrant it may (1) remand him to custody or (2) admit him to bail pending the hearing of the case.

Bail.

If bail is allowed it must be with a sufficient surety conditioned on the offender appearing for sentence.

Passing of sentence.

The court may after hearing the case pass sentence.

After hearing the case.

What is the scope of this hearing? The court is to determine what sentence is to be passed in the case and as it may not be the Court which convicted the accused and dealt with him as a first offender it should make itself acqainted with the whole of the record on which the conviction was had. It has no option to come to a different conclusion as to the guilt of the accused which must be taken to be finally established

by the decision of the Court which tried the case originally but its function acting under section 563 is to determine the sentence which should be passed.

PREVIOUSLY CONVICTED OFFENDERS.

Order for notifying address of previously convicted offender.

565. (1) *When any person having been convicted—*

(a) *by a Court in British India of an offence punishable under S. 215, S. 489A, S. 489B, 489C, or S. 489D, of the Indian Penal Code, or of any offence* punishable under Chapter *XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or*

(b) *by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor-General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, such Court or Magistrate may,*

if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) *If such conviction is set aside on appeal or otherwise, such order shall become void.*

(3) *The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.*

(4) *An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.*

(5) *Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made, shall be deemed, within the meaning of section 176 of the Indian Penal Code, to have omitted to give a notice required for the purpose of preventing the commission of an offence.*

(6) *Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.*

The Code provides for the notification of address by previously convicted offenders in certain cases with the object of preventing the commission of crime by such persons who are likely to break the law. Section 565 of the Code deals with the subject. The present section substituted for the old one

in 1923 is an improvement on the latter inasmuch as (1) it makes previous conviction in British India for an offence under section 215, 489A, 489B, 489C, or 489D, a ground for an order under the section besides such conviction for an offence punishable under Chapter XII or Chapter XVII of the Code with imprisonment of either description for a term of three years or upwards. (2) It also makes such previous conviction by a Court or Tribunal in the territories of any Prince or State in India a ground for an order under the section. (3) It gives all Magistrates of the first class power to make an order under the section and no longer requires that a first class Magistrate should be specially empowered in this behalf by the Local Government. (4) It authorises Appellate Courts or the High Court in revision to make an order under the section. (5) It lays down the venue where a person ordered to notify residence but who has not done so is to be tried

Previous conviction for one of the offences mentioned is necessary and the second conviction must also be for one of such offences

A Magistrate is not entitled to use an order which has been set aside as proof that the accused was an old offender on the ground that the previous order was set aside either in appeal or revision on technical grounds (*Ngapo Than* v. *Emp.* 3 *Rang.* 156).

Sentence of transportation or imprisonment.

The order is to be made at the time of passing sentence of transportation or imprisonment on the accused.

This means that on the second conviction there must be a sentence of imprisonment or transportation in order to justify an order for notification of residence. The sentence passed on the previous conviction may have been of any kind.

An order under the section cannot be made when the court instead of passing sentence of imprisonment or transportation passes a sentence of whipping only (*Emp.* v. *Tulji Ditya* 12 *Bomb. L. R.* 901 *S. C.* 35 *Bomb.* 137).

Order preventive not punitive.

An order under the section is not a punishment within the meaning of section 221 sub-section (7) (*Emp.* v. *Jhagroo 14 Cr. L. J. 390*).

Sub-Sec. 7 Sec. 221 has been amended in 1923 but even under the amendment it cannot include an order under the section within the meaning of the expression "enhanced punishment or to punishment of a different kind."

An order under the section is not punitive but preventive and the Court has discretion to make it or not.

Order dependent on conviction.

As the order is dependent on conviction it goes if the conviction is set aside in appeal or otherwise (*i.e.* in revision by the High Court).

The only other way of setting aside a conviction than on appeal is revision by the High Court and the word otherwise must mean that.

Power of Appellate Court and High Court.

An Appellate Court or the High Court in revision may make an order while affirming a conviction in a case which fulfils the requirements of the section but in which no order was made by the court of first instance. Such court has no power to make an order in a case not coming within the scope of the section.

What is to be notified.

Residence, change of residence or absence from such residence after release is to be notified. A man is not said to change his residence so long as he leaves his family in the house in which he has been residing (*Naddi Chengaden In re. 10 Mad. 789*).

Manner of notifying.

The address or change thereof or absence therefrom is to be notified in the manner prescribed by the Local Government by rules framed under sub-section 3 of section 565.

Limit of time during which order may be in force.

The order may be in force for five years from the date of the expiration of the sentence.

Propriety of any other preventive measure during currency of order.

The order is meant to secure the prevention of crime by the miscreant in question. During the period the order is in force the miscreant may be said to be under police surveillance. The police are kept informed of his whereabouts and it is their duty to watch him. If he commits an offence he is to be prosecuted for it and punished. Although it may not be impossible for a man under police surveillance to commit an offence still the opportunity for such commission must be less and the chance of intervening in time to prevent the commission of a contemplated offence on the part of the police much greater than in the case of an ordinary individual. In the case of such a man habitual commission of offences or systematic behaviour as a desperate and dangerous character ought to be impossible. A contrary state of things will only point to the inefficiency of those who are charged with the duty of watching him.

An order under the section is a preventive measure provided for by the legislature to guard against the possible lapse of a convicted criminal to a life of crime and it must be deemed to be sufficient in a case in which it is made by a competent Court as being appropriate to circumstances contemplated by the legislature as fit to attract the operation of the section. So long as such an order is in force no other preventive measure in the shape of a proceeding for bad livelihood ought to be taken.

Resort to preventive measures on the ground of habitual commission of crime evidences lack of competency in those whose duty it is to detect crime and to bring offenders to justice and to allow the application of more than one of such measures at the same time against the same individual is to put a premium on inefficiency in the detection of crime.

Non-compliance with order.

Non-compliance with an order under the section is an offence under section 176 of the Indian Penal Code (second part) punishable with simple imprisonment for six months or fine of one thousand rupees or both. It is a non-compoundable offence triable by a Presidency Magistrate or a Magistrate of the first class. The offence is bailable and a summons ought to issue in the first instance and the police cannot arrest without warrant. The prosecution may take place before a Magistrate of competent jurisdiction in the district in which the place last notified as residence is situated.

CHAPTER VI.

SECURITY FOR KEEPING THE PEACE OTHERWISE THAN ON CONVICTION.

The law on the subject is mainly contained in section 107 of the Code. Section 466 of the Code provides for the release of a lunatic charged with the commission of an offence on sufficient security being given that he shall be taken care of and shall be prevented from doing injury to himself or to any other person and for his appearance in Court when required.

107. (*1*) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate, *if in his opinion there is sufficient ground for proceeding*, may, in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(*2*) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or

disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

Procedure of Magistrate not empowered to act under sub-S. (1).

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reason, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under *Sub-section* (3) may in his discretion detain such person in custody *pending further action by himself under this chapter.*

History of section 107.

Under section 282 of the Code of 1861 (Act XXV) it was lawful for the Magistrate of the district or other officer exercising the powers of a Magistrate, whenever he received credible information that any person was likely to commit a breach of the peace or to do any wrongful act that might probably occasion a breach of the peace, to call upon such person to show cause why he should not be required to enter into a bond to keep the peace with or without sureties. Under section 288 if the Magistrate or other officer as aforesaid was satisfied that it was necessary for the preservation of the peace to take a bond from such person he could make an order accordingly. The maximum period for which the bond could be taken was one year (section 289). There was provision in section 240 for

extension of the period of the bond. If it appeared to the Magistrate or other officer aforesaid that it was necessary for the preservation of peace to bind the person over beyond the term of one year he might before the expiration of the first year record his opinion to that effect and the grounds thereof and might refer the case for the orders of the Court of Session and such Court might extend the term for a further period not exceeding one year. Under section 291 the Magistrate or other officer aforesaid might discharge any surety for keeping the peace and might order the release of the person confined for default in giving security.

The law was the same in the Code of 1872 the corresponding sections being sections 491, 498, 499, 500; only in section 491 corresponding to section 282 of the Code of 1861 "credible information" was replaced by "information" and in section 500 the power of discharge was given to the Magistrate of the district.

In the Code of 1882 the receipt of "information that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace" was as before the basis of the Magistrate's jurisdiction to take action under section 107.

The power of extension of the period of the bond to more than one year was dropped.

In the Code of 1898 section 107 remained the same, only in place of the words "receives information" the words "is informed" were substituted.

In 1923, in section 107, it has been enacted that on receipt of the necessary information the Magistrate may take action "if in his opinion there is sufficient ground for proceeding "whereas in the Code of 1898 as it stood before the amendment and in the Codes of 1872 and 1882 it was simply enacted in section 107 and the corresponding sections that on receipt of the information the Magistrate "may take action."

Perhaps in adding the words "if in his opinion there is sufficient ground for proceeding" the legislature has made an approach to the "credible information" of section 282 of the Code of 1861 in the sense that it empowers the Magistrate to

act under the section only if he thinks that there is sufficient ground for proceeding, in other words, only if the information is credible.

The vague and ambiguous nature of the power of detention given to a Magistrate under sub-section 4 of section 107 has been removed and it has been made clear that the Magistrate to whom a person is sent in custody by another Magistrate not empowered to take action under section 107 may in his discretion detain him in custody pending further action by himself for the purpose of taking security.

[*N.B.*—For other matters see note under "Security for good behaviour."]

It is to be noticed that in 1923 a new sub-section has been added to section 145 to the effect that nothing in section 145 shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107. This sub-section was added in consequence of a conflict of rulings as to the competency of a Magistrate to proceed under section 107 in cases of disputes relating to immovable property. The object of adding the sub-section in question must be that in cases of dispute relating to immovable property also a Magistrate can proceed under section 107 the scope of which is wider than that of section 145 inasmuch as the latter is limited in its application only to cases of disputes relating to immovable property in which there is a likelihood of a breach of the peace whereas the former is applicable to all cases in which there is likelihood of a breach of the peace.

[*N.B.*—See note later under Administration of section 107 as to the effect of sub-section 10, section 145.]

Summary of the law relating to security for keeping the peace otherwise than on conviction.

Jurisdiction of Magistrate.

Under section 107, a Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate or Magistrate of the first class only may take action.

A Sub-Divisional Magistrate can take action even if he is a Magistrate of the second class.

If a Magistrate not empowered by law in this behalf demands security for keeping the peace under section 107 his proceedings shall be void (section 530). When a Magistrate not empowered to proceed under the section finds the necessity of a proceeding he is to follow the procedure laid down in sub-section (3) section 107. The person to be proceeded against and the place where the breach of the peace or disturbance is apprehended must both be within the local limits of the Magistrate's jurisdiction but a District Magistrate or a Chief Presidency Magistrate may take action if only one of the two is within the local limits of his jurisdiction. (Section 107, sub-section 2).

Information.

The Magistrate can act on receipt of information that the person to be proceeded against is likely to commit a breach of the peace or disturb the public tranquillity or do any wrongful act that may probably occasion a breach of the peace.

Discretion of Magistrate.

The Magistrate has full discretion whether or not to proceed under the section on receipt of the necessary information. He is to take action if in his opinion there is sufficient ground for proceeding.

Where there is sufficient ground for proceeding the Magistrate is to draw up a proceeding requiring the person proceeded against to show cause why he should not be ordered to execute a bond for keeping the peace.

The bond.

The maximum period for which the bond may be called for is one year. In the bond the person bound over is to stipulate not to commit a breach of the peace or do any act that may

probably occasion a breach of the peace (see Form No. X, Schedule V of the Code).

The bond may be with or without sureties.

The initial order.

In the order drawing up the proceeding the Magistrate must set forth the substance of the information received, the amount of the bond to be executed, the period for which it is to be in force and the number, character and class of sureties (if any) required.

If the person in respect of whom such order is made is present in Court it shall be read over to him or if he so desires the substance thereof shall be explained to him. (Sec. 113).

Summons or warrant.

If such person is not present in Court the Magistrate shall issue a summons requiring him to appear or when such person is in custody a warrant directing the officer in whose custody he is to bring him before the Court. (Sec. 114).

Every summons or warrant issued, shall be accompanied by a copy of the initial order made and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same (section 115).

When the person in respect of whom a proceeding has been started is present in Court the Magistrate may require him to execute a bond with or without sureties for his appearance in such Court (section 91).

Whenever it appears to the Magistrate upon the report of a police officer or upon other information, the substance of which shall be recorded by the Magistrate, that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of the person in respect of whom a proceeding has been started the Magistrate may at any time issue a warrant for his arrest (section 114).

The Magistrate may in his discretion make the warrant bailable (section 76).

Proclamation and attachment of property.

The provisions of sections 87 and 88 relating to proclamation and attachment of property can be invoked if the Magistrate has reason to believe that the person against whom the warrant has been issued has absconded or is concealing himself.

Bail.

When the person arrested in execution of the warrant issued under section 114 is produced before the Magistrate he shall be released on bail if he is prepared to give bail ; such bail may be offered at any stage of the proceedings. The Magistrate may if he thinks fit instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance (section 496).

Detention in custody.

In the contingency contemplated by sub-section 4 of section 107 as also where the *ad interim* security called for under sub-section 3 of section 117 is not furnished the person arrested may be detained in custody (proviso, section 496).

Appearance by pleader.

The personal attendance of the person proceeded against may if the Magistrate sees sufficient cause be dispensed with and permission to appear by pleader given (section 116).

The enquiry.

In the presence of the person proceeded against or of his pleader when he is permitted to appear by pleader the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. (Sec. 117, sub-section 1).

As a general rule judicial proceedings are held in open Court. It is however noteworthy that section 352 of the Code which requires courts to be open to the public is confined to the place in which any Criminal Court is held for the purpose of enquiring into or trying any offence so that that section cannot have any application to a Court in which an inquiry under chapter VIII of the Code is held. But section 367 enjoins that the judgment should be pronounced in open court.

Ad interim security.

In the circumstances contemplated by sub-section 3 of section 117 the Magistrate can call for *ad interim* security in default of furnishing which the person proceeded against may be detained in custody.

The final order.

If upon the enquiry held it is proved that it is necessary for keeping the peace that the person in respect of whom the enquiry is made should execute a bond the Magistrate shall direct him to execute a bond with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit. (Sec. 118).

If the necessity for the bond is not proved an order of discharge in terms of section 119 shall be made and of release if the person proceeded against is in custody only for the purpose of the enquiry. (Sec. 119).

The Magistrate is to come to his decision on the evidence adduced by the parties and on that called by him on his own motion.

Joint enquiry.

When two or more persons have been associated together in the matter under enquiry they may be dealt with in the same or separate enquiries as the Magistrate thinks fit. (Cl. 5, section 117).

Procedure of enquiry.

The enquiry has to be made (under clause 2 of section 117) as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in a summons case.

Examination of witnesses.

When the person proceeded against appears or is brought before the Magistrate he shall proceed to take all such evidence as may be produced in support of the prosecution and also to hear the person proceeded against and take all such evidence as he produces in his defence (section 244). The Magistrate may, if he thinks fit, on the application of the prosecution or defence, issue a summons to any witness directing him to attend or to produce any document or thing (section 244). The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court (Sec. 244).

The Magistrate may at any stage of the enquiry summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined and he shall summon and examine or recall and re-examine any such person if his evidence appears to him to be essential to the just decision of the case (section 540).

A commission may be issued for the examination of a witness in the circumstances contemplated by section 503.

Local Inspection.

The Magistrate may at any stage of the enquiry inspect any place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at the enquiry.

He must without unnecessary delay record a memorandum of any relevant facts observed at the inspection.

The inspection must be held after due notice to the parties.

Mode of recording evidence.

In the Muffusil.*

As the examination of each witness proceeds the Magistrate shall make a memorandum of the substance of the evidence in the manner laid down in section 355.

Whenever any evidence is given in a language not understood by the person proceeded against it shall be interpreted to him in open Court in a language understood by him. (sub-section 1, section 361).

When documents are put in for the purpose of formal proof it shall be in the discretion of the Magistrate to interpret as much thereof as appears necessary (sub-section 3, section 361).

In a Presidency Town.

In every case tried by a Presidency Magistrate such Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record (sub-section 1, section 362).

Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer (sub-section 2, section 362).

The Magistrate shall make a memorandum of the substance of the examination of the person proceeded against (sub-section 2A, section 362).

[*N.B.*—Every order for security whether for keeping the peace or for good behaviour is now appealable under section 406 and therefore section 362 has to be followed in every case of security under sections 107, 108, 109, 110.

Sub-section 2A speaks of the substance of the examination of the accused and it is applicable to security proceedings in the view that the person proceeded against in such a proceeding is an accused.]

Right of being defended by lawyer.

The person proceeded against may of right be defended by a pleader or Muktear authorised under any law for the time being in force to practise in the court of the Magistrate or by an advocate, a vakil or an attorney of a High Court so authorised or by any other person appointed with the permission of the Court to act in the proceeding (sub-section 1, section 340—Cl. 4 section 4.)

Person proceeded against himself a competent witness.

The person proceeded against may offer himself as a witness in the proceeding (sub-section 2 of section 340).

Applicability of section 540A.

Section 540A which lays down the procedure when one or more of several accused persons are incapable of remaining before the Court will be applicable in the view that the person proceeded against is an accused. There is a difference between dispensing with personal attendance under section 116 and that under section 540A. In the former case in lieu of personal attendance appearance by pleader is allowed. On the analogy of substituted service it may be called substituted appearance and in the eye of law the person proceeded against is present. In the latter case the attendance is dispensed with and the enquiry is held in his absence but in the presence of the lawyer who is conducting the case on his behalf.

Change of Magistrate pending enquiry.

If after evidence has been partly recorded by a Magistrate he is succeeded by another or the case is transferred to some other Magistrate the second Magistrate may act on the evidence recorded by his predecessor or partly recorded by his predecessor and partly by himself or he may resummon the witnesses and recommence the enquiry (section 350).

Final order a judgment.

The order made after enquiry requiring security to be furnished by the person proceeded against is a judgment and should contain the points for determination the decision thereon and the reasons for the decision and should be dated and signed by the proceeding officer in open Court at the time of pronouncing it (section 367, sub-section 6).

(It should be such as to enable the Court of appeal or revision to decide whether all legal requirements have been complied with and the evidence properly considered).

Commencement of bond.

If any person in respect of whom an order requiring security has been made is at the time such order is made sentenced to or undergoing a sentence of imprisonment the period for which security is required shall commence on the expiration of such sentence. In other cases such period shall commence on the date of such order unless the Magistrate for sufficient reasons fixes a later date (section 120).

Deposit of money in lieu of bond.

The person ordered to give security may be permitted by the Magistrate to deposit a sum of money or government promissory-notes to such amount as he may fix in lieu of executing a bond (section 513).

Rejection of surety.

Any surety offered or previously accepted may be rejected by the Magistrate on the ground that he is an unfit person for the purpose of the bond in question. But before making an order of rejection there must be an enquiry on oath by the Magistrate himself or some other Magistrate subordinate to him (section 122).

Discharge of surety.

Any surety may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel his surety bond. Such Magistrate need not be the Magistrate who made the order for the bond. On such application being made the Magistrate shall issue his summons or warrant requiring the person for whom the surety is bound to appear or to be brought before him and on his appearance or production the bond shall be cancelled. (section 126, 126A).

Default in furnishing security.

If the security required is not furnished the person ordered to furnish the security shall be committed to prison or if he is already in jail shall be detained until the period of the bond expires or the security is furnished (sub-section 1, section 123).

When a person who has been sentenced to imprisonment in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order the latter sentence will commence immediately (proviso 2, section 397).

Imprisonment for failure to give security for keeping the peace shall be simple (sub-section 5, section 123).

Tender of security to jailer.

If the security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Magistrate who made the order and shall await the orders of such Magistrate (sub-section 4, section 123).

(*N.B.*—In cases disposed of in appeal by a higher Court which may be the Court of Session in the Muffusil and the High Court in a Presidency Town the reference is to be made to the Magistrate who made the order originally. It is he who is to decide whether or not to accept the security tendered and before refusing to accept a surety offered he must proceed under section 122. Presumably a surety offered to the officer in charge

of a jail will have to be produced before the Magistrate for the enquiry).

Special power of District Magistrate and Chief Presidency Magistrate.

The District Magistrate in the muffusil and the Chief Presidency Magistrate in a Presidency Town have power to release a person imprisoned for failure to give security if at any time in his opinion such person may be released without hazard to the community or to any other person. This power they can exercise even in a case in which the security was called for by a higher Court.

They can also reduce the amount of security or the number of sureties or the time for which security has been required but this they can do only where the order was not made by a superior Court. (section 124).

The District Magistrate and the Chief Presidency Magistrate have full plenary powers to cancel at any time any bond for keeping the peace executed by order of any Court in his district not superior to his Court. (section 125).

This they can do for "sufficient reasons" which may be that the bond should not at all have been taken or that it is no longer necessary.

Breach of bond.

The commission of a breach of the peace or the doing of any act that may probably occasion a breach of the peace is a breach of the bond. (See form No. X in Schedule V of the Code.)

The procedure on forfeiture of a bond is laid down in section 514. Proceedings in forfeiture may be taken by the Magistrate by whose order the bond was taken or any Presidency Magistrate or Magistrate of the first class.

The procedure on forfeiture of a bond and in the case of insolvency or death of a surety is laid down in section 514A.

Appeal.

Any person ordered under section 118 to give security for keeping the peace may appeal against such order if made by a Presidency Magistrate to the High Court and if made by any other Magistrate to the Court of Session. (section 406).

The local government may direct that in any district appeals shall lie to the District Magistrate instead of to the Sessions Judge. (section 406).

Any person aggrieved by an order refusing to accept or rejecting a surety may appeal against such order if made by a Presidency Magistrate to the High Court, if made by the District Magistrate to the Court of Session and if made by a Magistrate other than the District Magistrate to the District Magistrate. (section 406A).

An appeal may lie on a matter of fact as well as a matter of law. (section 418).

The form of an appeal and the mode of presenting it are laid down in section 419.

The provision for appealing from jail is contained in section 420.

The power to dismiss an appeal summarily is given to courts in section 421 but no appeal can be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same (proviso, section 421).

Notice of the time and place of hearing the appeal finally is to be given to the appellant and the Crown as provided in section 422.

The Appellate Court may after perusing the record and hearing the appellant or his pleader if he appears and the public prosecutor if he appears, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may alter or reverse the order for security or make any amendment or any consequential or incidental order that may be just or proper. (section 423).

The Appellate Court may if it thinks necessary take additional evidence or cause it to be taken by a Magistrate who may not be the trying Magistrate. (section 428).

If in an appeal from an order of a Presidency Magistrate the judges composing the bench of the High Court are equally divided in opinion the case with the opinion of the differing judges is to be laid before another judge of the same Court whose opinion shall be the judgment of the High Court. (Section 429).

An order passed for forfeiture of a bond under section 514 by any Magistrate other than the District Magistrate is appealable to the District Magistrate or if not so appealed may be revised by him (section 515).

(There is no provision for an appeal against such an order made by a Presidency Magistrate or a District Magistrate).

No additional evidence can be taken in an appeal under section 515 for section 428 which deals with the taking of additional evidence applies only to appeals under chapter XXXI of the Code.

Revision by High Court.

All orders for security for keeping the peace made under section 118 may be revised by the High Court which in revision can exercise all the powers of an Appellate Court. (Sub-section 1, section 439).

But no proceedings by way of revision shall be entertained at the instance of the party who could have but has not appealed. (Sub-section 5, section 439).

When in revision the judges composing the bench in the High Court are equally divided in opinion the case has to be, as in an appeal, laid before a third judge. (Sub-section 1, section 439).

Proceedings pending before a Magistrate may be quashed by the High Court and for this purpose the Sessions Judge or the District Magistrate may make a report to the High Court under section 438 of the Code after calling for the records under section 435.

When the record of a proceeding before a Presidency Magistrate is called for by the High Court under section 435 the Magistrate may submit with the record a statement setting

forth the grounds of his decision or order and any facts which he thinks material to the issue and the High Court is bound to consider such statement before overruling or setting aside the decision of the Magistrate (section 441).

Transfer.

A case under section 107 can be transferred by the Chief Presidency Magistrate or District Magistrate or Sub-Divisional Magistrate under sections 192 and 528 and by the High Court under section 526.

Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer a case under section 107 of which he has taken cognizance to a subordinate Magistrate. (Section 192).

(*N.B.*—The use of the words "taken cognizance" cannot by reference to section 190 take out a case under section 107 from the purview of section 192—the former does not define "taking cognizance" as something necessarily to be done in connection with an offence but simply lays down how an offence may be taken cognizance of. It does not say anything as to how cognizance may be taken of any other case).

Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may withdraw a case under section 107 from, or recall such a case which he has made over to, any Magistrate subordinate to him and may try such case himself or refer it for trial to any other such Magistrate competent to try the same. (Section 528).

The High Court may transfer a case under section 107 whether in its original or appellate stage from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction (section 526).

CHAPTER VII.

ADMINISTRATION OF SECTION 107.

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SCOPE OF SECTION.

Object of Section.

The object of the section is to prevent a breach of the peace by a person who is likely to commit it.

Civil right to be respected.

The preventive jurisdiction of a Magistrate under the section must be exercised with caution when its exercise may lead to the infringement of an undoubted Civil right. Where an obligation which the law of the country imposes becomes incapable of being enforced owing to the exercise of such a jurisdiction and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the

corresponding obligation of the other party the Magistrate should not bind down the party who has the legal right in him. If there are doubts as to the existence of the respective rights and obligations of the parties the Magistrate should bind down both parties so that his order may not be detrimental to either.

Where however no doubt exists the party in the wrong should be bound down.

An attempt to ascertain the legal rights of the parties should always be made by the magistrate before he binds down one of the parties (*Din Dayal Mazumder* v. *the Emperor 11 C. W. N. 1002 ; see also Gesiram* v. *Emp. 1919 Pat. 98*).

To bind down one and not the other party in case of doubtful rights is to encourage the infraction of legal rights under cover of legal authority. (*Gesiram* v. *Emp.*). An order should not be made against one party so as to give an advantage to the other side in a case where there are only disputes as to civil rights but no imminence of a breach of the peace (*Gesiram* v. *Emp. 1919 Pat. 98*).

Where there are two parties on the worst of terms and there is danger of a breach of the peace in consequence both should be bound down and not only one of them. (*Bindaban* v. *Emp. 22 Cr. L. J. 701*).

The section has no application to the case of a person exercising a Civil right in a lawful manner (*Bepin Behary Mukerji* v. *Emp. 21 Cr. L. J. 651*).

Proceedings under the section are only intended for the security of the public peace, not for the purpose of enabling one of two contending parties to help themselves in recovering possession of immoveable property after having their adversary's hands tied down by an order under the section (*Jalal* v. *Emp. 19 Cr. L. J. 446*).

A Magistrate will not be justified in demanding security from a party simply because the opposite party would commit a breach of the peace if the former insisted on their rights (*Desi Kachai 15 Cr. L. J. 661*).

Where the Magistrate found that the persons who attempted to do *Bastu Puja* which provoked the petitioners were not

entitled to perform this *puja* it was held that if the petitioners acted properly and within their rights there was no reason to suppose that any breach of the peace was likely to be committed by them. (*Bejoy Singha Neogi* v. *Empress* 3 *C.W.N.* 463).

It is not the intention of the legislature to prevent persons even though bound over under the section from seeking to enforce their rights in the civil court (*Sital* v. *Emp.* 1 *Lahore* 310).

Where one party under a claim of proprietorship of a certain place wanted to levy certain cesses upon the other party for their use of the place which the latter refused to pay and the Magistrate without attempting to ascertain the respective rights and obligations of the two parties bound over the former, it was held that the Magistrate's order was bad in law. He ought to have tried to ascertain the truth or otherwise of the obligations of both sides and if he found that the question of the respective rights and obligations of the parties was not easy of solution by him in the proceeding he ought not to have bound down one party only (*Din Doyal Majumdar* v. *Emp.* 11 *C. W. N.* 1002).

One of several co-sharer landlords sought to make a measurement of lands contrary to the provisions of section 90 and 188 of the Bengal Tenancy Act. It was held that the other co-sharer landlords were justified in objecting and where no force had been used by them they ought not to have been bound over to keep the peace inasmuch as any likelihood of a breach of the peace was really due to the action of their co-sharer (*Bhabataran Ghosh* v. *Bankutosh Lal Mitra* 9 *C. W. N.* 618).

Order should not be made so as to open out opportunity for illegal activity.

Where there were old standing feuds between the parties which in the course of events had come to a head by a serious litigation and the Magistrate finding no evidence against the masters discharged them but on the assumption that there was a likelihood of a breach of the peace ordered their servants to provide sureties, it was held that the magistrate made an order

in such a form as to leave the masters no alternative except on the one hand to lose their servants by refusing to give sureties so that the servants would have to go to jail or be bound hand and foot by onerous security for the conduct of servants who might leave the masters the next day and pursue at the instigation of the other side a consistent course of legalised blackmail upon their masters and the order was illegal and without jurisdiction (*Din Dayal* v. *Emp.* 23 *A. L. J.* 300).

Dispute between landlord and tenant.

In a case there was a dispute between the Zemindars on the one hand and the tenants on the other with regard to the possession of certain land.

The Deputy Magistrate instituted proceedings under section 145 between the parties and attached the land and made a temporary settlement thereof with a third party. One of the parties to the proceeding having moved the High Court the proceedings were held to be defective and the Deputy Magistrate allowed them to be dropped holding that there was no further apprehension of a breach of the peace. The third party however remained in possession of the land and there being in the meantime a survey and settlement of rights in the village the settlement officer recorded them as being persons in possession and the zemindars apparently acquiesced in the arrangement. The tenants however attempted to interfere and were eventually bound down under section 107. It was held that the proceedings were based on a misunderstanding of the real position of the parties and therefore could not be maintained (*Maighlal Sing* v. *Ambica Jha* 5 *Cal. L. J.* 447).

After the sale of a Putni under Reg. VIII of 1819 a Darpatnidar continued to be in possession and insisted upon collecting rents from the rayats even though the revenue authorities and the zemindars had done everything necessary for them to do to put the purchaser in possession. It was held that the Darputnidar was wrongful and that he was rightly bound down to keep the peace. The fact that he had brought

a suit to set aside the sale could make no difference, the effect of the regulation being to render the act unlawful until such time as the sale shall have been set aside. (*Bisarat Ali* v. *Umapad 9 C. W. N. 792*).

Anything done by the tenant to compel the landlord not to be aggressive against the former is not by itself a ground for requiring the tenant to give security. It is only when something is done from which breach of the peace may be apprehended that security may be taken.

Rights of lessees.

A lessee of a property attached under section 145 Cr. P. C. is entitled to protection in his possession of land let out to him. That however is not a bar to proceedings against the lessee under section 107 of the Code if the Magistrate is satisfied that such action is necessary in the interests of the public peace (*Jadrai 18 Cr. L. J. 1007*).

Taking of procession along public road if to be prevented.

A party insisting upon their right to take a procession along a certain road to which another party objected cannot be bound down to keep the peace unless there is a finding that the taking of the procession along the particular path is a wrongful act or that the processionists are themselves likely to commit a breach of the peace or disturb the public tranquility. (*Feroze Ali Mullik* v. *Emp. 12 C. W. N. 703*).

When a party have the right to take a procession along a particular road they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party (Per Woodroffe J. Feroze Ali Mullik *v.* Emp. 12 C. W. N. 703).

Dispute between rival religious sects.

If in the case of rival religious sects composing an assembly one sect of persons try to force their views on the other with the result that a disturbance of the public peace is probable an order binding down the former to keep the peace

may be permissible. Such order should merely deter them from creating a breach of the peace and continuing to annoy the others at their worship but should not prevent them from exercising their right of worship (*Gurdeo Sing* v. *Emp.* 21 *Cr. L. J.* 225).

Where it was proved that the persons ordered to furnish security were men who had shown by their acts and general behaviour that the object of their lives for the time was to disturb the public tranquillity by wounding the religious feelings of the Mahamadans of a certain locality it was held that the Magistrate was justified in making the order (*Chunilal* v. *Emp.* 14 *A. L. J.* 430).

The blowing of a conch in a public place for personal amusement or with any other lawful and innocent motive as in connection with religious ceremonies and without any intention of annoying or hurting the religious feelings of any other person is not a wrongful act. But when certain Hindus commenced to perform ceremonies involving the blowing of a conch in a place in no way set apart for the purpose and where no such ceremonies had hitherto been performed and did it with the deliberate intention of trampling over, insulting and wounding the religious feelings of the Mahomadan neighbours it was held that this was a wrongful act likely to provoke a breach of the peace and disturb the public tranquillity and therefore any person found responsible for such conduct was a proper subject for an order under section 107. (*Emp.* v. *Murli Sing* 33 *All.* 775).

Right of public discussion.

The right of public discussion is a right which every subject possesses and persons convening a meeting to discuss religious matters are not doing anything unlawful. If owing to the prevalence of ill-feeling between certain persons likely to attend the meeting or any other cause a breach of the peace is expected the Magistrate should proceed under section 144 (and not under section 107) to see that the peace is not broken (*Ngati* v. *Maung Kyaw Yan* 18 *Cr. L. J.* 512).

Dispute regarding performance of Puja.

The right to perform the Puja of an idol or have a share of the offerings made to the idol is not such a right relating to land as is provided for in section 147. If there is such a dispute between the parties which the Magistrate considers may lead to any breach of the peace he may take such steps as he considers necessary under section 107. (*Surendra Nath Banerji* v. *Shoshi Bhuson Sarkar 52 Cal. 959 S. C. 42 C. L. J. 127*).

Section if applicable to land disputes.

Sub-section 10 section 145, added in 1923, provides that nothing in section 145 shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

This sub-section has been added to section 145 in 1923 in consequence of a conflict of rulings as to the power of a Magistrate to proceed under section 107 in cases of land disputes.

The effect of the sub-section is that section 145 does not in any way bar the application of section 107 to disputes relating to immovable property if they can be dealt with under the later section the applicability of which must be determined by the conditions laid down in the section.

In enacting sub-section 10 of section 145 the Legislature has practically given effect to the decision of a Full Bench of the Calcutta High Court in *Abbas* v. *Emp. 16 C. W. N. 83* which held as follows:—The fact that there is a dispute concerning land likely to cause a breach of the peace does not deprive a Magistrate of jurisdiction under section 107 where he receives information against any person of the nature contemplated in the section. Whether after proceeding under section 107 it will be proper for the Magistrate to act under section 145 must depend on the circumstances of each case as it arises. The competence of the Magistrate to proceed under section 107 against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

Section 107 differs from section 145 in the manner following.

Section 145 has no application in a Presidency Town whereas section 107 applies equally to Magistrates in Presidency towns and the Muffossil.

For the purpose of section 145 it is sufficient if the subject matter of the dispute is within the local limits of the Magistrate's jurisdiction. The parties may or may not be within the local limits of the Magistrate's jurisdiction but under section 107, unless the Magistrate is a Chief Presidency or District Magistrate, both the person to be proceeded against and the place where the breach of the peace or disturbance is apprehended must be within the local limits of the Magistrate's jurisdiction, so, where the parties are non-resident, Magistrates ordinarily have no power to apply section 107 to the case of a dispute relating to land or water which can only be dealt with under section 145.

Under section 145 the likelihood of a breach of the peace must arise out of dispute concerning land or water as defined in the section or the boundaries thereof. That being so there must be two parties to the dispute at least, in other words two parties at least must be behaving in a manner likely to lead to a breach of the peace.

The likelihood of a breach of the peace sufficient to attract the operation of section 107 may be due to the aggressive conduct of one party as against another and may be wholly unconnected with land or water.

The object of section 145 is to settle the dispute and by removing the root cause to put a quietus on the activities of all parties concerned to break the peace and thus to prevent a breach of the peace.

The object of section 107 is to prevent a breach of the peace by putting a restraint on a person likely to commit a breach of the peace.

Therefore if the prevention of a breach of the peace is to be secured by means of proceedings under section 107 in cases of disputes relating to land and water all the parties to the dispute must be proceeded against.

Section 107 has nothing to do with the determination of possession of the land or water to which a dispute may relate (*Saroda Prossad Sing* v. *Emp.* 7 *C. W. N.* 142) and if all parties to the dispute are bound down none can exercise any rights over it although in lawful possession of such rights and the property in question remains uncared for and the usufruct thereof is not lawfully utilised by any one there being no provision for attachment as under section 146.

Under section 145 the party found on enquiry to be in possession is declared to be in lawful possession of the property in dispute and the whole world is to respect such possession. If no one is in possession the property is attached and managed. In any case the usufruct of the property is lawfully utilised.

Interference with the lawful exercise of the rights over property by means of the process of a criminal court is not the policy of the law unless it is absolutely necessary to maintain peace in which case only the indispensable minimum is to be resorted to—far less does the law sanction the rendering of property absolutely valueless to any one of those who contribute to the resources of the state and are in turn entitled to protection from it.

All circumstances taken together disputes relating to land and water should be dealt with, in spite of sub-section 10 section 145 inserted for the first time in the Code in 1923 to negative the effect of the rulings wherein it was held that section 107 did not apply to cases of land disputes, under section 145 which is fully effective as an immediate measure to prevent a breach of the peace inasmuch as it empowers the Magistrate in case of emergency to attach the subject of dispute pending the decision after enquiry under the section and in all cases to make suitable arrangement for the disposal of crops or other produce which may be subject to speedy and natural decay.

It has been held that where the clear and undoubted possession of a party is being forcibly disturbed by a number of persons belonging to the opposite party action under section 107 is quite legal and proper (*Lachmi Sing* v. *Emp.* 22 *Cr. L. J.* 86). Where it is not a case of undisputed possession by one party but there is dispute as to actual possession the Magistrate

should not take action under section 107 but should proceed under section 145 (*Kaliprosad Gope* v. *Dhodhai Gope 22 Cr. L. J. 574 ; Gouri Dutta* v. *Govinda Sing 20 Cr. L. J. 829*). If a person is out of possession of the land in dispute and there is no danger of a breach of the peace unless he attempts to resume possession he should be referred to other remedies and the fact that his dispossession was *prima facie* illegal and his attempts to resume possession may result in a breach of the peace are not sufficient grounds for binding over the opposite party to keep the peace. (*Dhuma* v. *Emp. 23 Cr. L. J. 567*).

Upon the authourities the principle is clear that the provisions of section 145 are mandatory and while it is discretionary with the Magistrate to draw up proceedings under section 107 the proper course where there is a *bona fide* dispute as to land is to proceed under section 145. Otherwise the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession.

Where however one party is clearly in the wrong and threatens to disturb the rights of another who is in actual possession of the land the position is different.

Possession of land not to be determined in proceeding under Sec. 107.

The Magistrate is not competent to arrive at a finding as to possession except in a judicial enquiry held under sec. 145 Cr. P. C. (*Sarada Prossad Sing* v. *Emp. 7 C. W. N. 142*).

INITIATION OF PROCEEDINGS.

Jurisdiction of Magistrate—both person to be proceeded against and place of apprehended disturbance must be within the local limits of the Magistrate's Jurisdiction.

Except in the case of the District Magistrate in the Muffussil and the Chief Presidency Magistrate in a Presidency town both the person to be proceeded against and the place

where the breach of the peace or disturbance is apprehended must be within the local limits of the Magistrate's jurisdiction.

As to the local limits of the jurisdiction of Magistrates other than the District Magistrate it is necessary to bear in mind the provisions of section 12 of the Code under which the Local Government may define local areas within which Magistrates will exercise their powers but except as otherwise provided by such definition the jurisdiction and powers of Magistrates extend throughout the district.

Temporary residence is sufficient to give a Magistrate jurisdiction (*Zianullah Khan* v. *Emp. 22 Cr. L. J. 109*).

(*N.B.*—As to the meaning of the expression "within the local limits of his jurisdiction" see note on the subject Chap. XV).

Effect of Transfer as to Jurisdiction.

On transfer the Magistrate to whom a case is transferred acquires jurisdiction irrespective of the person and the place referred to above being within or without the local limits of his jurisdiction—only he must be a Magistrate having powers to take action under the section.

The words "proceedings shall not be taken" in sub-section 2 of section 107 must mean that they shall not be initiated except in the manner laid down in that sub-section. The sub-section controls only the initiation of the proceedings and not the making of the final order.

When a case is transferred under section 192 it is the whole case that is transferred and not merely the case of the person against whom proceedings have been drawn up.

Under section 190 it is the offence that is taken cognizance of, that is, the whole case and not merely the case of the accused for the time being before the court and when such a case is transferred under section 192 the Magistrate to whom the transfer is made is competent to proceed against other accused persons who were not before the Magistrate from whose file the case is transferred.

Section 190 describes the mode in which cognizance of an offence may be taken. The mode of taking cognizance of other cases is not laid down in the Code and in fact even as regards offences the mode laid down in section 190 is not the only mode of taking cognizance of an offence but is one in which cognizance may be taken. Whenever a Magistrate exercises his judicial discretion and initiates a proceeding under Chapter VIII of the Code he must be taken to take cognizance of such a case and when such a case is transferred is it the whole case and not merely the case of the person against whom proceeding has actually been drawn up which goes to the Magistrate to whom the case is transferred and can such Magistrate proceed if he so chooses against any other person mentioned in the information on which the proceeding has been started but against whom proceedings have not been taken? (*See in this connection Patti Mahton* v. *Nagina Sing 1918 Pat. 12*).

But there cannot be any proceeding under Chap. VIII against any person unless the formality laid down in Sec. 112 has been complied with.

Subordinate Magistrate cannot act under orders of District Magistrate.

Proceedings cannot be started by a subordinate Magistrate on the direction of the District Magistrate who may himself draw up the proceeding and then transfer the case to a subordinate Magistrate competent to dispose of it (*Hanif Sheikh* v. *Jahami Mandal 24 Cr. L. J. 367*).

Special powers of District and Chief Presidency Magistrates as to initiation of proceedings.

The District Magistrate and the Chief Presidency Magistrate may however take action when either the person to be proceeded against or the place where the breach of the peace or disturbance is apprehended is within the local limits of his jurisdiction.

Even on the direction of the District Magistrate a subordinate Magistrate has no jurisdiction to draw up a proceeding

under section 107 against a person residing in another jurisdiction. In such a case the proceeding must take place and be brought to a conclusion before the District Magistrate himself. (*Nirbikar Chandra Mukerji* v. *Emp.* 13 *C. W. N.* 580).

In this view when a Magistrate of the first class draws up a proceeding in a case in which the person proceeded against and the place of apprehended disturbance are both within the local limits of his jurisdiction the case may be transferred to any other first class Magistrate by a competent authority but when a District Magistrate draws up a proceeding in a case where the person proceeded against is outside the local limits of his jurisdiction it cannot be transferred to a Magistrate of the first class who is not competent to draw up a proceeding in such a case.

This case which was decided *ex parte* goes too far and unduly curtails the power of transferring a case. The policy of the legislature is that in cases where the accused lives in another jurisdiction proceedings must be started by the District Magistrate or Chief Presidency Magistrate, *i.e.*, the highest Magistrate.

Sub-section 2 speaks of taking proceedings which means initiating proceedings and all that is necessary is that the proceedings should be drawn up by the highest Magistrate who shall before starting them consider whether there is sufficient ground for taking action.

Even the omission on the part of the District Magistrate to formally draw up proceedings has been held not to be fatal.

In a case when a breach of the peace was apprehended in a Sub-Division and the District Magistrate was moved for the commencement of proceedings as the accused was living in the sudder and the District Magistrate instead of drawing up proceedings and sending the case to the Sub-Divisional Magistrate for trial merely said that he sanctioned the proceedings and sent the case to the Sub-Divisional Magistrate it was held that the irregularity did not deprive the trying Magistrate of jurisdiction in the case and could not affect the merits of the trial in any way (*Narendra Sing* 19 *Cr. L. J.* 267).

Discretion of Magistrate in taking action.

The Magistrate may or may not take action in his discretion. On receipt of the necessary information he is to apply the section only if in his opinion there is sufficient ground for proceeding. In case of a dispute relating to immoveable property likely to cause a breach of the peace section 145 enjoins that the Magistrate if he is satisfied as to the existence of a dispute of the aforesaid nature shall take action in the manner laid down in the section but under section 107 the Magistrate may take action "if in his opinion there is sufficient ground for proceeding."

If in his opinion there is sufficient ground for proceeding.

These words have been added in 1923.

In the Code of 1861 in section 282 which was the section corresponding to section 107 the words used were "receives credible information." In 1872 the word "credible" was dropped in section 491 and the section in the Code of 1872 as in that of 1882 ran as "receives information."

In 1898 "receives information" was replaced by "is formed." In 1923 the words in question were added to section 107 as also section 108.

Whenever a section of a statute says that a Magistrate shall do a certain thing he has no discretion in the matter and he is bound to do what the law directs him to do but when it says that a Magistrate may do a certain thing he may or may not do it in his discretion, in other words, he may do it if in his opinion there is sufficient ground for doing it. The very nature of the provision of law that the Magistrate may do a certain thing carries with it the qualification that he may do it if in his opinion there is sufficient reason for doing it.

What then did the legislature mean to emphasise by adding the words in question to sections 107 and 108? If the words were added as a matter of caution that the Magistrate should exercise his discretion there is no reason why the necessity of the caution should be emphasised only in cases under section 107 and 108 and not under sections 109 and 110 which certainly

require as much caution, if not more, in their application as sections 107 and 108.

The addition may be quite unnecessary and a superfluity. Perhaps the legislature means that the Magistrate is to test the information to see whether it is credible or not and to take action only if the information is credible which condition was expressly laid down in section 282 of the Code of 1861. It follows then that the Magistrate is to make an enquiry as to the truth of the information before drawing up a proceeding.

Though an application under section 107 is not a complaint and though section 203 does not apply to it every Magistrate has inherent power to dismiss a groundless application and hence when after making an enquiry himself or through some other agency he is satisfied that the apprehension of a breach of the peace complained of in an application under section 107 does not exist he may dismiss the application without taking the evidence that the applicant wants to produce in support of it (*Shamsuddin* v. *Ram Dayal Sing 25 Cr. L. J. 89*).

It is inexplicable however why sections 107 and 108 should be placed on a different footing from sections 109 and 110 so far as the present question is concerned.

Disqualification of Magistrate.

The provisions of section 190 cl. (c) and section 191 have been held not to apply to proceedings under section 110. (In the matter of *Mether Khan 27 All. 172*). But the principle of section 190 cl. (c) has been held to apply (*Godhan Ahir* v. *Emp. 4 Pat. L. J. 7*) and therefore when a Magistrate has framed proceedings under section 110 against a party and has proceeded in some measure on his own knowledge of the character of the party such Magistrate is not a proper person to proceed with the trial (*Alimuddin Haldar 29 Cal. 392 S. C. 6 C. W. N. 595*).

A proceeding under section 107 stands exactly on the same footing as one under section 110 so far as the point in question is concerned and the rule of law laid down in the cases cited above will equally govern both classes of proceedings.

Under section 556 a Magistrate who is personally interested in a case or party to it is disqualified from trying the same except with the permission of the court to which an appeal lies from his court.

Initiation of proceedings.

Under section 112 the Magistrate must make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force and the number, character and class of sureties (if any) required.

The issuing of a notice under section 112 is the initiation of the proceedings. The notice is the substitute for an indictment in a trial for an offence and therefore it should contain the substance of the information on which the Magistrate acts.

The Magistrate may initiate proceedings on information derived from any source but he cannot proceed on his own knowledge.

The final order must be in conformity with the initial order.

Provisional bond pending enquiry.

The absence of any provision in the Code of Criminal procedure for the prevention of disturbance during the pendency of proceedings under sec. 107 often led to the passing af orders by Magistrates absolutely necessary in the circumstances of the case but wholly illegal, for example the appointment of the persons proceeded against as special constables (*Pardip Sing v. Emp. 20 C. W. N. 855*). The legislature has now supplied the want.

Pending the completion of the enquiry provisional bond for keeping the peace may be taken by the Magistrate.

The justification for such a bond is the necessity of immediate measures for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for public safety.

The provisional bond may be with or without sureties. In default of execution of the bond the person proceeded against may be detained in custody.

Such detention will terminate with the conclusion of the enquiry or the execution of the bond.

In an enquiry for keeping the peace the provisional bond can only be for keeping the peace.

The conditions of such bond must not be more onerous than those mentioned in the initial order under section 112.

Information on which to act.

Before drawing up a proceeding the Magistrate must have before him clear and definite information against the person to be proceeded against. (*Farid* v. *Firu 8 Sind L. R. 207 S. C. 16 Cr. L. J. 235*).

The information should disclose tangible facts and details so that the person against whom proceedings are initiated may be afforded notice of what he is to come prepared to meet (*Ainuddin* v. *Emp. 24 Cr. L. J. 230*).

Where there was already a cattle market and certain persons intended to open another cattle market upon their own land not far from the old market and the Magistrate apprehending that there would be a breach of the peace bound them down to keep the peace it was held that the order was illegal as the section was confined to cases where the Magistrate was informed that a person was likely to commit a breach of the peace or to do any wrongful act which might occasion a breach of the peace (*Mahu* v. *Emp. 16 A. L. J. 279*).

Where on a memorial by the tenants against the zeminder containing certain allegations which were not substantiated on enquiry proceedings were drawn up against the zeminder they were questioned on the ground that the memorial and the report made on it after enquiry did not furnish sufficient information (*Nafar Chandra Pal Choudhary* v. *King Emp. 28 C. W. N. 23*).

An information that a person is likely to disturb the public tranquillity without any information being given of that person's intent to do any wrongful act may be sufficient (*Jaguji Rai* v. *Emp. 16 A. L. J. 567*).

Accused's own statement cannot supply information.

It is illegal for the Magistrate to issue notice merely because he considered from the accused's own statement that he was a quarrelsome person (*Abdul Karim* v. *Emp. 21 Cr. L. J. 511*).

Previous Enquiry how far Relevant.

In initiating proceedings a Magistrate should not rely upon facts or information which formed the subject of a previous enquiry under section 107 or in connection with charges under the Penal Code of which the accused were acquitted. There must be fresh materials available on which it can be said that a fresh apprehension has arisen of a breach of the peace being committed by the accused. The same facts cannot form the subject of repeated proceedings either under the Penal Code or under the Criminal Procedure Code (*Nagireddy Kondareddy In re. 41 Mad. 246*).

Revival of proceedings.

In an earlier case it was held that though there was nothing in law to prohibit a revival of proceedings on the same facts it was not right to vex a party repeatedly with proceedings under Chap. VIII on the same facts as formed the foundation for previous proceedings when those facts were found insufficient to justify an order for security (*Mutha Moopan In re. 36 Mad. 315*).

Is likely to commit a breach of the peace.

Likelihood of a breach of the peace is the foundation of the Magistrate's jurisdiction. An order cannot be made against a person merely because he is a wealthy or an influential member of a party (*Jagat Narain* v. *King Emp. 7 Al. L. J 1161*).

The section presupposes that the person sought to be put upon a rule of bail is likely (not was likely) to commit a breach of the peace and that it cannot be presumed from the fact that the person has done a wrongful act in the past that he is likely

to do the same again (*In re. Shivram Parashram 6 Bomb. L. R. 663*).

It is not enough to show that there is great probability of a breach of the peace ensuing, it must further be shown that the party is likely to do illegal acts of violence (*Emp.* v. *Chanbasawa 6 Bomb. L. R. 862*).

Direct evidence of specific incidents necessary.

Direct evidence of specific incidents in which accused behaved as a man of violent and aggressive temper is admissible and relevant to the question whether he was likely to commit a breach of the peace or not (*Barnes* v. *Emp. 23 Cr. L. J. 394*).

The mere fact that a dispute exists between two rival Zemindars would not justify proceedings being taken under section 107 against all their officers and servants unless there are materials to show that they are likely to commit any breach of the peace (*Ainuddin* v. *Emp. 24 Cr. L. J. 230*).

The person proceeded against must himself be likely to commit a breach of the peace.

The person proceeded against must himself be likely to commit a breach of the peace or disturb the public tranquillity (*Ngate Maung Kyaw II Bur. L. T. 59 S. C. 18 Cr. L. J. 512 ; Grant* v. *Emp. 64 Ind. Cases 137 ; Jagat Narain* v. *King Emp. 7 A. L. J. 1161*).

Security should not be demanded from a person who is not likely to commit a breach of the peace himself but is likely to induce another person to do so (*Dewat Sing* v. *Emp. 13 Cr. L. J. 126*), but the contrary view that an instigator may be proceeded against has also been taken (*Barnes* v. *Emp. 23 Cr. L. J. 394*).

There must be information that the particular persons against whom proceedings are initiated had done anything or at least had instigated others to do anything to cause a breach of the peace or to disturb the public tranquillity (*Ainuddin* v *Emp. 24 Cr. L. J. 230*).

Liability of master for acts of servant.

Where the threat to commit acts of violence came from the peons of a zeminder with the knowledge and consent of the manager an order against the manager was held to be justifiable (*Bepin Behary Mukerji* v. *Emp. 21 Cr. L. J. 651*).

Where the petitioner asserted a claim to take offerings from pilgrims alighting at Gaya Railway Station and sent servants armed with lathis to the Station to accost pilgrims with the result that there were disturbances with the servant of a person who asserted a similar claim but the petitioner never went to the station himself, it was held that the petitioner was liable to be bound down (*Bala Lal Mahton* v. *Emp. 1 Pat. L. J. 361 S. C. 18 Cr. L. J. 374*).

Likelihood of breach of the peace without overt acts.

Likelihood of a breach of the peace although no overt acts took place prior to the commencement of the proceedings may justify an order for security (*Ohiuddin Chaudhary* v. *Emp. 19 Cr. L. J. 266*).

An order for security is justifiable in a case where after the occasion on which ill-feeling between the parties first came to a head had passed without an actual disturbance there remained the probability of a recurrence of it in the near future. (*Ajodhya Prosad* v. *Emp. 8A. L. J. 1080*) *but it has also been* held that facts which might be taken to establish the probability of certain persons disturbing the public tranquillity at a particular annually recurring festival would afford no ground after such festival had passed without the public tranquillity having been disturbed for binding over such persons to keep the peace with a view to the possibility of their creating a disturbance on the next occasion of the festival (*Basdeo in the matter of 26 All. 196*).

Inference of likelihood from previous acts.

When the acts committed by an accused person are of such a nature that the continuity of these acts or the commission of similar acts by the accused is apprehended to be tending to

a breach of the peace the section is applicable notwithstanding that the acts already committed by the accused constituted specific offences under the Penal Code (*Khetrobashi Shahu* v. *Emp. 19 Cr. L. J. 246*).

Likelihood inferred from utterance of threats and previous relation of parties.

The Court is entitled to take into consideration the utterance of threats by a party on different occasions as the previous relations of the parties and the antecedent and existing circumstances but the use of language of mere bombast does not render the persons using it liable to be dealt with under the provisions of the section. (*Chinnathambi Rowthan In re. 9 M. L. J. 271*).

Likelihood not to be inferred from arrangement for defence of property with public help.

In a case there was an old standing dispute about certain property between two parties and the applicant's party obtained decree from the Civil Court and the other party threatened to oust the applicant's party by means of armed force. The help of the police was asked for by the applicant and some constables were sent. The applicant posted some of his men armed with lathis to defend the property if necesssary. He was called upon to furnish security. It was held that the applicant was justified in posting men for the defence of his property in the presence of the police guard and having done so in self-defence it could not be said that there was any likelihood of a breach of the peace from his side (*Janki Prosad Tewari* v. *Emp. 18A. L. J. 157*).

ARREST, DETENTION IN CUSTODY, Etc.

Arrest under section 114.

See note under section 110.

Bail under section 496.

Where the Magistrate allowed bail to the petitioners on condition of their undertaking that no attempt would be made

by them or their agents to realise rent by force and nothing would be done to induce a breach of the peace it was held, that the condition could not be imposed under Sec. 112 Cr. P.C. and should be struck out of the bail bond (*Bibee Kulsum* v. *Umatul Mehdi 11 C. W. N. 121*).

No bail should be called for from a person against whom proceedings under Sec. 107 are contemplated but not actually initiated. The most that can be required of him is to furnish recognizance and that only when there is any likelihood of his *absenting himself from court.* (*Mewalal Thakur* v. *Emp. 11 C. W. N. 415*).

See note under section 110.

Bond for appearance may be taken from person proceeded against.

See note under section 110.

Detention of person proceeded against in custody.

See note under section 110.

Proclamation against person proceeded against and attachment of his property.

See note under section 110.

Person proceeded against may be exempted from personal attendance in Court.

See section 116.

THE ENQUIRY.

There must be an enquiry into the truth of the information and an order made without such enquiry is bad in law (Mul *Chand* v. *Emp. 12 A. L. J. 1262 S. C. 37A 30; Chander Shekar* v. *Emp. 21 Cr. L. J. 59*).

Under section 117 the enquiry is to be conducted in the manner prescribed for conducting trials and recording evidence in summons cases. (Sections 242, 243, 244).

Upon general principles every person is entitled in the absence of exceptional authority conferred by the law to the contrary effect when required by the judiciary either to forfeit his liberty or to have his liberty qualified to insist that his case shall be tried separately from the cases of other persons similarly circumstanced (*Q. E.* v. *Abdul Kadir 9 All. 452*).

Joint Enquiry.

Under sub-section 5 of section 117 when two or more persons have been associated together in the matter under inquiry they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Where all the acts alleged against certain persons against whom a joint enquiry was instituted were found to have been done by them for the benefit of their common master, *viz.*, with a view to extort Kabulyats at enhanced rates from his tenants it was held (Henderson J dissentiente) that although each of the acts alleged was not done by all of them together yet they were associated together within the meaning of Sec. 117 so as to justify a joint enquiry (*Srikanto Nath Shaha* v. *Emp. 9 C. W. N 898 S. C. 1 C. L. J. 616*).

It follows that two opposing parties cannot be proceeded against in the same enquiry.

(*Har Dutt Pande* v. *Emp. 14 A. L. J. 268 ; Kamal Narain Choudhary* v. *Emp. 11 C. W. N. 472 S. C. 5 Cal. L. J. 231 ; Gangapati Bhattu* v. *Emp. 31 Mad. 276 ; Kishore Ahir* v. *Emp. 26 Cr. L. J. 1248*)

Where wrongful overt acts are committed or threatened to be committed jointly by a number of persons and not by some of them the act is really committed severally and jointly by each of them who become all liable to the penalty of section 107 (*Lachmi Sing* v. *Emp. 1 Pat. L. T. 681*).

Where a number of persons have joined together to boycott a class of people joint action can be taken against all of them (*Bajirao* v. *Emp 25 Cr. L. J. 132*).

(See note under section 110 where the subject has been fully dealt with).

The main principles applicable to a criminal trial regarding joinder of charges and the joint trial of accused persons should be applied to enquiries under sec. 107 Cr. P. C. Where both the parties to a proceeding under sec. 107 were tried together (some amongst them having also been examined as witnesses in the case) and were bound down in the result of the trial it was held that there was misjoinder of the nature condemned in *Subramanya Iyer* v. *King Emp. 25 M. 61* (*Privy Council*) such as could not be cured by sec. 537 Cr. P. C. (*Pran Krishna Shaha* v. *King Emp. 8 C. W. N. 180*).

Two opposing parties to a dispute cannot be proceeded against under section 107 in one proceeding.

This is apparent as joint enquiry is permissible under clause 5 of section 117 only when the persons proceeded against are associated together in the matter under enquiry (*Kamal Narayan Choudhury* v. *Emp. 11 C. W. N. 472 S. C. 5 Cal. L. J. 231 ; Ganaputi Bhattary* v. *Emp. 31 Mad. 276 ; Kishore Ahir* v. *Emp. 26 Cr. L. J. 1248 Hardatt Pandey* v. *Emp. 14 A. L. J. 268*).

Evidence.

Under section 117 the Magistrate is to enquire into the truth of the information on which action has been taken and to take such further evidence as may be necessary.

"Further evidence" has been interpreted to refer to evidence *ejusdem generis* with the evidence already described (*Emp.* v. *Jaggan 36 Al. 239 per Knox J.*).

Order not to be made on suspicion.

In the absence of evidence that the accused are likely to commit a breach of the peace or disturb the public tranquillity an order under section 107 should not be passed merely on vague suspicion. (*Guru Swamy Nadan* v. *Emp. 22M. L. J. 251*).

Order not to be made merely on consent.

An order should not be made without recording evidence merely because the person proceeded against consents to be bound over.

(*Emp.* v. *Rani Sing 20 Cr. L. J. 105 ; Crown* v. *Sheodan 16 Cr. L. J. 784 ; Pradhudas* v. *Emp. 57 I. C. 672 ; Jagdat Tewari* v. *Emp. 21 Cr. L. J. 176 ; Prem Sing* v. *Emp. 18 Cr. L. J. 847 ; Karam* v. *Emp. 23 Cr. L. J. 175 ; Joti Mallik* v. *Emp. 25 Cr. L. J. 710*).

Outside knowledge not to be relied upon.

The order is to be based on evidence relevant to the case and not upon knowledge derived by the Magistrate from source outside the record. (*Mathura Shahu* v. *Emp. 14A. L. J. 769 Brijnandan* v. *Emp. 12A. L. J. 1246 S. C. 37A 33*).

Facts of previous abortive proceeding not to be relied on.

(*See Nagireddy Konda Reddy 41 Mad. 246 ; Mutha Mupan 36 Mad. 315*).

But where an apprehension of a breach of the peace arose out of some undisputed facts and in connection with those facts a charge of murder was laid unsuccessfully against certain persons but subsequently proceedings under section 107 were started against one of them and other persons and they were ordered to furnish security to keep the peace it was held that the proceedings on the charge of murder did not exclude the proceedings under section 107 (*King Emp.* v. *Gobardhan Sing 6 Oudh L. J. 285*).

What must be proved by evidence.

It must be proved that the person from whom security is demanded is likely to commit a breach of the peace. (See *Jagnat Tewari* v. *Emp. 21 Cr. L. J. 176* and other cases cited before under the heading "Is likely to commit a breach of the peace").

An order under section 107 can only be passed where there is a finding that the persons sought to be bound down are guilty

of wrongful acts committed or sought to be committed by them which can only be proved by overt acts against each individual (*Lachmi Sing* v. *Emp.* 1 *Pat. L. J.* 681).

Such likelihood although no overt acts took place prior to the commencement of the proceedings justifies an order for security. (*Obiduddin Chowdhury* v. *Emp.* 19 *Cr. L. J.* 266).

Mere existence of bad feeling not sufficient.

Mere enmity between the parties is no ground for an order (*Narendro Bahadur Pal* v. *King Emp.* 1*A. L. J.* 418). Existence of bad feeling between two sections of a community is not sufficient (*Sher Khan* v. *Emp.* 12 *Cr. L. J.* 186).

Necessity of individual finding where several persons are proceeded against.

Where there are several persons proceeded against something definite to go upon with reference to each accused person individually is required (*Sher Khan* v. *Emp.* 12 *Cr. L. J.* 186).

It is illegal for a Magistrate to bind down all of several persons proceeded against without coming to a separate finding as regards each of them individually (*Ajodhya Prossad Sing* v. *Emp.* 12 *C. W. N.* 992).

It is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. It is improper to treat what is evidence against one as evidence against all without discriminating between the cases of the various persons implicated (*Q. E.* v. *Abdul Kadir* 9 *All.* 452).

There must be definite evidence in the case of any and every person proceeded against that there is a danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that they are indulging in feelings of hostility towards another body of persons. (*Shambhunath* v. *Emp.* 38 *All.* 468).

It must be shown that there were definite facts from which an inference could be warranted that the persons charged would

disturb the public tranquillity unless preventive measures be taken and further evidence must show that the persons sought to be bound down were individually and not merely collectively connected with those facts (*Gesiram* v. *Emp.* 20 Cr. *L. J.* 194).

Examination of witnesses.

See sec. 244 (as in a summons case).
Sec. 540 (examination of witness called by the court).
Sec. 503 (commission for the examination of witness).

Mode of recording evidence in the Muffusil.

The Magistrate is to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. (Sub-section I section 355).

As to interpretation of evidence see sec. 361.

Mode of recording evidence in a Presidency Town.

Under section 406 as it now stands every order for security for keeping the peace made by a Presidency Magistrate is appealable to the High Court and under section 362 in every case tried by a Presidency Magistrate in which an appeal lies the Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in opon court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer.

Therefore in every case of security for keeping the peace before a Presidency Magistrate the evidence has to be taken down in full. The general policy in the Code is to shape the procedure of Presidency Magistrates in such a way as to exempt them from some formalities which must be gone through by a Muffusil Magistrate but the effect of section 362 and 406 taken together is to make the procedure for a Presidency Magistrate

in a case of security for keeping the peace more detailed than that to be followed by a Magistrate in the Muffusil. It is sufficient for a Muffusil Magistrate to make a memorandum of evidence but a Presidency Magistrate will have to take down the evidence in full.

By virtue of sub-section 2A section 362 in every appealable case the memorandum of the substance of the examination of the accused is to be recorded by a Presidency Magistrate.

Taking a person proceeded against under section 107 to be an accused person the memorandum of the substance of the examination of such a person has to be recorded (*See Sheikh Piru 41 C. L. J. 148 per Mukerji J.*).

Right of defence by lawyer.

The person proceeded against may of right be defended by a pleader or a Mukteer authorised under any law for the time being in force to practise in the Court of the Magistrate or by an advocate, a vakil or an attorney of a High Court so authorised or by any other person appointed with the permission of the Court to act in the proceeding (sub-section 1 of section 340—cl. 4 of section 4).

Any person not even a lawyer may be permitted by the Magistrate to conduct the defence.

Person proceeded against himself a competent witness.

The person proceeded against for security for keeping the peace may offer himself as a witness in the proceeding (sub-section 2 section 340).

Sub-section 2 of section 340 is an exception to the general rule that an accused person cannot offer himself as a witness (See discussion under section 110).

When any one or more of the persons proceeded against is or are incapable of remaining before the Court.

Taking a person proceeded against under section 107 to be an accused section 540A applies.

(See note under section 110).

Local inspection.

Under section 539B the Magistrate may at any stage of the enquiry, visit and inspect any place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given.

The local inspection is to be held after due notice to the parties and sufficient margin of time should be left between the service of notice and the holding of the inspection to enable the parties to be present with their lawyers or other representatives.

A memorandum of any relevant fact observed at the inspection must be recorded by the Magistrate without unnecessary delay.

In Hriday Govind Sur *v.* Emp. 40 C. L. J. 149 it was held that the omission to record an inspection note as required by sec. 539B is an illegality which cannot be cured by proving absence of prejudice.

In Forbes *v.* Mahammad Ali Haider Khan 42 C. L. J. 131 it was held in a case under sec. 145, in which the Magistrate did not make a memorandum after holding the inspection and the petitioners did not ask the Magistrate to do so, that the omission was an irregularity and did not vitiate the proceedings in the absence of prejudice.

In enacting sec. 539B for the first time in 1923 the legislature has given effect to the rulings of the different High Courts on the subject.

The only legitimate object of holding a local inspection is to appreciate the evidence adduced by the parties properly.

The question arises, can the Magistrate test the sworn testimony on the record by the light of his own observations? In Babban Shiekh *v.* Emp. 14 C. W. N. 422 Stephen and D. Chatterji J. J. take the view that he can and D. Chatterji J relies on In re. Lalji 19 All. 302 and Lal Behary 10 C. W. N. 181.

As laid down by their Lordships of the Judicial Committee in Harprossad 3 Indian Appeals 259 a judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts.

"There is no authority for holding" says Woodroffe J. in Babban Shiekh *v.* King Emp. 14 C. W. N. 422 "that a Court may take a view of the locality for any purpose other than that of understanding the evidence, for example, to see whether the complainant or the accused is speaking the truth on a certain point. If it were permissible there would appear to be in such a case no necessity for evidence at all as regards this particular fact."

It goes without saying however that if the Magistrate has seen a certain state of things and if witnesses examined before him testify to the contrary it is natural that he should believe the testimony of his own senses and disbelieve the sworn testimony. It seems to be a psychological impossibility that he should do otherwise and inspite of all possible safeguards the fact of local inspection by the Magistrate particularly where the idea of such inspection emanates from the Magistrate himself may very often give rise to a not unreasonable apprehension in the mind of either of the parties concerned. In the famous words of Lush J. in Sergeant *v.* Dale 2 Q. B. D. 558 the law in laying down the strict rule regarding the disqualification of judges "has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibility of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

If the Magistrate omits to record the memorandum as required by the section he renders himself liable to be summoned as a witness and cross-examined as to what he saw. This means that the case will have to be transferred from his file to that of some other Magistrate.

Taking the person proceeded against to be an accused a copy of such memorandum must be supplied to such person free of costs.

Courts to be open.

Under section 352, only the place where a Criminal Court

is held for the purpose of enquiring into or trying any offence is to be deemed an open Court.

So under the Code there is no injunction for an enquiry under chapter VIII being held in an open Court.

But under sub-section 6 of section 367, added for the first time in 1923, an order under section 118 is a judgment for the purpose of section 367 under sub-section 1 of which such an order must be dated and signed by the presiding officer in *open court* at the time of pronouncing it.

Examination of accused.

Section 342 of the Code is not applicable. Sub-section 3 indicates that the section contemplates only inquiries into or trials for offences (see Benode Behary Nath *v.* Emp. 50 Cal. 985).

But in a case tried by a Presidency Magistrate the Magistrate is bound to make a memorandum of the substance of the examination of the person proceeded against under sub-section 2A, section 362 (*Shekh Piru 41 Cal. L. J. 142 per Mukerji J.*).

No influence to be used to person proceeded against to induce disclosure.

Taking the person proceeded against to be an accused section 343 of the Code applies in favour of such a person

Adjournment.

The hearing of the case may be adjourned from time to time under section 344.

(See note under section 110).

Change of Magistrate.

Under section 350 if after evidence has been partly recorded by a Magistrate he is succeeded by another or the case is transferred to some other Magistrate the second Magistrate may act on the evidence recorded by his predecessor or

partly recorded by his predecessor and partly by himself or he may resummon the witnesses and recommence the enquiry.

The section speaks of an enquiry or trial and there is no difficulty about a case of security for keeping the peace coming within the scope of the section. But the question of the applicability of the proviso to the section is not free from doubt. (See discussion under section 110).

Proceedings should not be kept pending indefinitely.

Proceedings under the section should not be kept pending in order that such pendency may have the effect of preserving the peace and preventing conduct likely to cause a disturbance of the public tranquillity (*Grant* v. *Emp. 64 Ind. cases 137*).

THE FINAL ORDER.

The amount of every bond shall be fixed with due regard to the circumstances of each case and must not be excessive. (*Section 118, See Q* v. *Reza Ali 23 All. 80*).

Sufficient time must be given to furnish the security called for (*Maung Tan* v. *Emp. 4 Bur. L. J. 172*).

When the person ordered to furnish security is a minor the bond shall be executed only by his sureties (section 118).

In all other cases such person must execute his own bond which cannot be dispensed with and the order confined to furnishing sureties only (*Emp.* v. *Uddami 1A. L. J. 593 S. C. 1904 A. W. N. 230*).

When the persons are landed proprietors their personal security should be sufficient (*Brindaban* v. *Emp. 22 Cr. L. J. 701*).

(*Note.*—As to prohibitive sureties see note under section 110 and the cases cited there).

Absence of complainant and his witnesses, effect of.

In a case under sec. 107 Cr. P. C. if the complainant and prosecution witnesses are found absent an order under sec. 119 discharging the person proceeded against is a proper order to pass.

Sec. 247 Cr. P. C. does not apply to a case under sec. 107 Cr. P. C. (*Asrafali Saiyal* v. *Nasu Sarkar* 31 *C. W. N.* 388).

Final order a judgment.

Under the new sub-section 6 of section 367 an order under section 118 is a judgment so that such an order must contain the point or points for determination, the decision thereon and the reasons for the decision and must otherwise conform to the provisions of section 367.

SURETY.

The present section 122 which has been substituted for the old one lays down the procedure to be followed by a Magistrate before rejecting a surety already accepted or refusing to accept one offered as also the ground on which an order of rejection or refusal can be made.

The ground is that the surety is an unfit person for the purposes of the bond.

The pocedure is that the Magistrate must himself make an enquiry on oath or cause it to be made by a subordinate Magistrate who is to make a report after enquiry.

The substance of the evidence adduced in the enquiry must be recorded.

(*Note.*—See note under section 110 where the subject has been discussed).

Application by surety for discharge.

A surety may apply for discharge to a Presidency Magistrate or Magistrate of the first class. Such Magistrate need not be the Magistrate who made the order originally but evidently he must be a Magistrate in whose jurisdiction the person bound down is, for on such application the Magistrate is to issue his summons or warrant requiring the person bound down to appear or to be brought before him. On the appearance or the production of such person the bond shall be cancelled.

The Magistrate shall order the person in question to give for the unexpired portion of the term of such bond fresh security of the same description as the original one.

Every such order shall for the purposes of sections 121, 122, 123, 124 be deemed to be an order made under section 118.

Cancellation, Breach of bond, Imprisonment.

Power of District Magistrate and Chief Presidency Magistrate to release persons imprisoned for failure to give security and to reduce amount and period of bond (sec. 124).

See note under section 110.

Power of District Magistrate and Chief Presidency Magistrate to cancel bond (sec. 125).

See note under section 125 in connection with section 110.

A District Magistrate acting under sec. 125 does not hold a judicial proceeding and therefore cannot make an order under sec. 476 in respect of documents filed before him when acting under sec. 125 (*Dayanath Thakur* v. *Emp. 14 C. W. N. 306*).

Breach of bond.

Form No. X in Schedule v. of the Code is the bond to be executed under section 107.

Commission of a breach of the peace or the doing of any act that may probably occasion a breach of the peace is a breach of the bond.

On a breach of the bond being committed the amount of the forfeited bond may be exacted but the person bound over cannot be forthwith committed to prison for the unexpired portion of the term for which security was taken (*King Emp.* v. *Jagdeo Sing 28 A. 629 S. C. 1906 A. W. N. 142 ; Emp.* v. *Ignatia Reis 14 Cr. L. J. 430*).

Forfeiture of bond.

The procedure on forfeiture of bond is laid down in section 514. (See also sec 514A).

Imprisonment for failure to give security.

Such imprisonment is to be simple (sub-section 6, section 123). See note under section 110.

(*N.B.*—No person under the age of sixteen years can be sent to prison in default of furnishing security—section 21 Bengal Children Act II of 1922. Under section 22 of this Act the Court may in such a case send the person bound over to a Reformatory School. The Act however applies, at present, to the Town and suburbs of Calcutta and the Municipality of Howrah only).

APPEAL.

Section 406 provides for appeal against all orders of security and section 406A against all orders refusing to accept a surety offered or rejecting a surety previously accepted.

Under section 515 all orders passed under section 514 relating to forfeiture of bond by any Magistrate other than a Presidency Magistrate or District Magistrate are appealable to the District Magistrate or if not so appealed may be revised by him.

See note under section 110.

Powers of an appellate Court.

Sec. 423 defines the powers of an Appellate Court. It is competent to a Court hearing an appeal in a case under sec. 107 to direct a retrial of the case. (*Emp.* v. *Bhagvat Sing 48 All. 501*).

REVISION.

See note under section 110.

Quashing of proceedings.

See note under section 110.

Institution of proceedings if can be ordered in revision.

If the Magistrate who is responsible for the administration of the area committed to his charge is not satisfied that there

is any need to take proceedings under chapter VIII of the Code it is questionable whether any superior judicial authority can interfere with the exercise of his discretion though there is no doubt that revisional jurisdiction can properly be exercised to check the Magistrate's proceedings if he exceeds the powers given him by law for the prevention of offences.

Where proceedings were drawn up under sec. 107 and the petitioner moved the High Court and contended that action should be taken under sec. 145 it was held that the High Court was not competent to direct the Magistrate to initiate proceedings under sec. 145. With the expression of opinion that it was desirable in the case to proceed under sec. 145 the High court left it to the Magistrate to consider whether or not to proceed under that section. (*In the matter of Ekram Sing* 3 *C. W. N.* 297. *See also Amulya Charan Sarkar* v. *Amritalal Mukherji* 24 *C. W. N.* 1075).

MISCELLANEOUS MATTERS.

The "curing section" (537) how far applicable.

See note under section 110.

Inherent power of the High Court (Sec. 561A).

The High Court may in the exercise of its inherent powers make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Further enquiry.

No order for further enquiry under section 436 can be made in a case of security under Chapter VIII of the Code. Section 436 as amended in 1923 speaks only of the case of a person accused of an offence. The amendment removes all doubts as to the applicability or otherwise of the section which were expressed when the section dealt with the case of an accused who had been discharged instead of as now, the case of any person accused of an offence who has been discharged.

Transfer.

A case under section 107 may be transferred under sections 192, 528, 526 of the Code.

(See note under section 110).

Clause 8 of Section 526 is applicable to a case under Section 107 and the person proceeded against is entitled to an adjournment to enable him to move the High Court for a transfer (*Wazid Ali Khan* v. *Emp. 41 Cal. 719 S. C. 18 C. W. N. 174*).

Proceedings initiated by the District Magistrate under special powers conferred on him by Section 107 (2) can be transferred by him for disposal to the Court of some subordinate Magistrate otherwise competent to deal with the matter *Surya Kanto* v. *Emp. 31 Cal. 350 ; Rakhal Mandal* v. *Emp. 27 Cr. L. J. 314*).

But this view is in conflict with that taken in *Nirbikar Chandra Mukerji* v. *Emp. 13 C. W. N. 580* which proceeds on the assumption that such proceedings are not only to be initiated by the District Magistrate but are to be brought to a conclusion before him.

The view taken in *Surya Kanto* v. *Emp.* seems to be reasonable for the words in sub-section 2 of section 107 are that proceedings shall not be taken except in the manner laid down therein.

The word "taken" ought certainly to be interpreted as initiated. Sub-section 2 does not in any way restrict the making of an order under section 118 but simply controls the initiation of the proceedings. (*See Surya Kanto* v. *Emp.*).

As to section 528 it was held in a Madras case that a District Magistrate cannot transfer a proceeding under section 107 to a Magistrate who has no jurisdiction over the matter (*Nagireddy Kondarreddy In re. 41 Mad. 246*).

The section says that the case may be referred for inquiry or trial to any other Magistrate competent to enquire into or try the same. This should be taken to mean that the Magistrate to whom the case is referred must be either a Sub-Divisional Magistrate or Magistrate of the first class. Any other Magistrate will not be competent to try a case under section 107 and

therefore such a case cannot be transferred to such other Magistrate but to go so far as to hold that a Magistrate competent to try the case means only the Magistrate who drew up the proceeding under section 107 and no one else is to lay down a proposition which militates against the general policy of the Code which debars a Magistrate from trying a case in which he is personally interested or shows bias in favour of one side or to which he is a party.

As to transfer of a preventive proceeding from one District to another it was observed in *Chandi Proshad* v. *Emp. 17 C. W. N. 536* that it should not be done except in extremely exceptional cases.

Simultaneous proceedings under section 107, 144, 145, if proper.

It is inconvenient that proceedings under section 107 and also under section 144 or section 145 should be going on at the same time.

In a case, on the application of the petitioners for the assistance of the Magistrate in the matter of possession of a piece of land an injunction was issued under section 144 and proceedings were taken under section 107. It was held that the procedure was bad as in effect it debarred the petitioners from giving evidence of possession and that if on the expiry of the injunction under section 144 there was any apprehension of a breach of the peace the more appropriate procedure would be to take proceedings under section 145 rather than under section 107. (*Abinash Chandra Mandal* v. *Loknath Gari 19 Cr. L. J. 367*).

Conversion of a proceeding started under section 107 to one under section 145 and *vice versa*

The procedure laid down in sub-section I of section 145 must be followed and it is not proper to change a proceeding under section 107 into one under section 145 and pass final orders as to possession without following the provision of that sub-section. (*Sahdeb Sing* v. *Juman Mulla 19* Cr. *L. J. 320*).

If a proceeding under section 107 is changed into one under section 145 it must be taken that a fresh case is started and fresh evidence is to be taken after publication and service of the initial order contemplated by sub-section I of section 145.

Nor is it proper to make an order under section 107 in a proceeding tried as one under section 145 (*Emp.* v. *Sri Deo 14 A. L. J. 794*).

The Magistrate is not competent to arrive at a finding as to possession except in a judicial enquiry under sec. 145 (*Saroda Prosad Sing* v. *Emp. 7 C. W. N. 142*).

Conversion of a proceeding under section 107 to one under section 110.

Where after issuing notices to parties under section 107 the Magistrate took proceedings under section 110 but evidence was recorded at length and the parties had opportunity to cross-examine all the prosecution witnesses and were not prejudiced it was held that the irregularity in procedure was cured by section 537 of the Code. (*Emp.* v. *Perumal Naick 14 Cr. L. J. 65*).

Propriety of order under the Police Act during pendency of proceeding under Sec. 107.

Where the petitioners were appointed special constables during the pendency of proceedings under sec. 107 against some of them and were prosecuted for refusing to serve as such constables, the proceedings were quashed by the High Court. (*Pardip Sing* v. *King Emp. 20 C. W. N. 855*).

Remedy if any in frivolous cases against accuser.

A proceeding may be started on information contained in a petition filed by an interested party. Where such a proceeding after enquiry ends in an order of discharge under section 119 no order for compensation under section 250 can be made against the party who petitioned the Court even if the Court ultimately finds that the allegation made was false and

frivolous or vexatious (*See Bindhalal Prosad Roy* v *Lal Behary Roy 36 All. 382*).

False evidence

A proceeding under section 107 is a judicial proceeding and any one who makes a false statement in such a proceeding is liable to be punished as in any other case.

But the District Magistrate acting under sec 125 does not hold a judicial proceeding and cannot therefore make an order under sec 476 in respect of any document filed before him when acting under sec. 125 (*Daya Nath Thakur* v. *Emp. 14 C. W. N. 306*).

Privileged character of statements in petition for initiation of Proceedings.

Statements made in a complaint to a Magistrate under section 107 praying that security should be taken from a person for keeping the peace and a repetition of the same statements before a police officer to whom the Magistrate referred the complaint for inquiry and report are absolutely privileged and no action for defamation in respect of such statement is maintainable (*P. Sanjivi Reddy* v. *K. Koneri Reddi 49 Mad. 315*).

Applicability of the special provisions of Chap. XXXIII.

Under sec 443 as it stood before the amendment of 1923 no Magistrate unless he was a justice of the peace and (except in the case of a District Magistrate or Presidency Magistrate) unless he was a Magistrate of the first class could *enquire into or try any charge against an European British Subject.*

Under this section it was held that an European British subject proceeded against under sec. 107 could claim the advantage of trial by a special Magistrate (*Hopcropt* v. *Emp. 13 C W N 151*). But the special provisions of Chap XXXIII of the Code as enacted in 1923 are confined to the trial of offences only and cannot therefore apply to a proceeding under sec 107.

CHAPTER VIII.

SECURITY TAKEN OTHERWISE THAN ON CONVICTION FOR THE SAFE CUSTODY OF A LUNATIC CHARGED WITH THE COMMISSION OF AN OFFENCE.

466. (*1*) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *whether the case is one in which bail may be taken or not* may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(*2*) *If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Local Government* :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

The release of a lunatic charged with the commission of an offence is provided for in the Code in a manner which will prevent the lunatic from doing injury to himself or to any other person.

A lunatic is incapable of making his defence and therefore he cannot be tried for whatever he may have done which if done by a sane person is an offence but it is the duty of the state to guard against all possible injury by such a lunatic to himself or to any one else. For this purpose section 466 of the Code has been enacted.

The amending Act of 1923 has made the section applicable to all cases bailable or not by substituting the words "whether the case is one in which bail may be taken or" for "if the case is one in which bail should not in the opinion of the Court be taken or in which security demanded is not given."

In a case coming under sub-section 2 the Court has been given a discretion to decide the manner of detention pending orders by the Local Government.

Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was by reason of unsoundness of mind incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law the finding shall state specifically whether he committed the act or not (section 470). Whenever the finding states that the accused person committed the act alleged the Magistrate or Court before whom or which the trial has been held shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody, in such place and manner, as the Magistrate or court thinks fit and shall report the action taken to the Local Government. (Section 471).

Whenever any relative or friend of any person, detained under the provisions of section 466 or section 471, desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall, (amongst others) be properly taken care of and prevented from doing injury to himself or to any other person, order such person to be delivered to such relative or friend (Section 475).

CHAPTER IX.

SECURITY FOR GOOD BEHAVIOUR.

History of the sections containing the law.

Under the first Code of Criminal procedure (Act XXV of 1861) as also under the second (Act X of 1872) security for good behaviour could be taken from three classes of persons *viz.*, (1) vagrants and suspected persons (2) reputed offenders (3) habitual offenders. In the first class of cases the maximum period of the bond was six months, in the second one year and in the third three years.

Sections 295, 296, 297, of the Code of 1861 and sections 504, 505, 506 of the Code of 1872 dealt with these cases respectively. Section 295 of Act XXV of 1861 was applicable whenever it appeared to the Magistrate of the District or to an officer exercising the powers of a Magistrate that any person not having any ostensible means of subsistence or who could not give a satisfactory account of himself was lurking within his jurisdiction. It was necessary that the person lurking should be without any ostensible means of subsistence or unable to give a satisfactory account of himself.

In the Code of 1872 the scope of the corresponding section 504 was enlarged so as to make it applicable whenever it appeared to the Magistrate of the District or to a Magistrate of the first class that any person was lurking within his jurisdiction or that there was within his jurisdiction a person who had no ostensible means of subsistence or who could not give a satisfactory account of himself. "Lurking" by itself was made a ground for the interference of the Magistrate as also "being without ostensible means of livelihood or failing to give a satisfactory account of himself."

In the Code of 1882 "lurking" was replaced by "taking precautions to conceal his presence with a view to commit an offence." This was also the law in the Code of 1898 and is still the law after the amendment of 1923.

Section 296 of the Code of 1861 and section 505 of the Code of 1872 dealt with a person who appeared to the Magistrate from evidence as to general character adduced before him to be by repute a robber, house-breaker, or thief or a receiver of stolen property knowing the same to have been stolen or of notoriously bad livelihood or a dangerous character. Such person could be required to execute a bond for good behaviour for a period not exceeding one year.

Section 297 of the Code of 1861 and section 506 of the Code of 1872 dealt with a person who appeared to the Magistrate from evidence as to general character adduced before him to be by habit a robber, house-breaker or thief or a receiver of stolen property knowing the same to have been stolen or of a character so desperate and dangerous as to render his release without security at the expiration of the limited period of one year hazardous to the community. Such a person could be required to execute a bond for good behaviour for a period not exceeding three years.

Section 504 of the Code of 1872 as also section 295 of the Code of 1861 were applicable whenever it appeared to the Magistrate that there was a person contemplated by the section within his jurisdiction and section 505, 506 of the Code of 1872 and sections 296, 297 of the Code of 1861 were applicable whenever it appeared to the Magistrate on evidence as to general character adduced before him that there was a person contemplated by the sections within his jurisdiction.

The evidence as to "general character" was made admissible in cases under sections 505, 506, while a case under section 504 was to be decided on evidence according to the ordinary law governing the admission of evidence.

The person who could be proceeded against under section 505 of the Code of 1872 and section 296 of the Code of 1861 was one who by repute committed offences against property mentioned or was "of notoriously bad character" or "a dangerous character" while section 506 of the Code of 1872 and section 297 of the Code of 1861 contemplated the case of a person who by habit committed offences against property or was of a character so desperate and dangerous as to render his

release without security after one year hazardous to the community.

So evidence as to "general character" was admissible to prove a person's reputation, habit and dangerous character.

When Act X of 1872 was superseded by Act X of 1882 section 504 was re-enacted in section 109 and "lurking" was substituted by "taking precautions to conceal his presence with a view to committing an offence." The maximum period of the bond was as before six months. Sections 505, 506 were moulded together into section 110 and the section was directed against property and the application of the section to desperate and dangerous characters was excluded. Under section 117 the fact of being a habitual offender might be proved by evidence of general repute or otherwise.

Sections 504 and 505 spoke of "evidence of general character" only as the material on which the Magistrate was to come to his decision.

This evidently was loose drafting for it could not be the intention of the legislature that such evidence alone would be admissible and not any other. The intention apparently was to make such evidence admissible in addition to any other that might be taken under the ordinary law of evidence and which was forthcoming. This was made clear in the Code of 1882.

The scope of the section was limited to habitual offenders only and evidence of general repute was made admissible to establish the habit besides other evidence (Cl. 3 section 117).

As before European British subjects were exempted from the operation of section 109 or 110 (section 111).

In enacting Act V of 1898 the legislature went back to the Code of 1872 and again brought desperate and dangerous characters within the scope of the section (110) besides habitual offenders but no change was made in Cl. 3 of section 117 so that evidence of general repute was admissible only to show that the person proceeded against was a habitual offender under clauses (*a*) to (*c*) but not to show that he was desperate and dangerous within the meaning of Cl. (*f*). The scope of the section was enlarged so as to include a larger class of habitual offenders against property *viz.* a person who "habitually pro-

tects or harbours thieves or aids in the concealment or disposal of stolen property" or who "habitually commits mischief, extortion or cheating or attempts so to do." Besides offences against property habitual commission of or attempt to commit the offences of counterfeiting coin, currency notes or stamps and of offences involving a breach of the peace as also abetting the commission of offences involving a breach of the peace were included within the purview of the section.

A notable change made in the Code in 1898 was the introduction of a provision (section 108) for security for good behaviour from persons disseminating seditious matter or any matter likely to promote enmity between classes or any matter concerning a judge which amounts to criminal intimidation or defamation under the Indian Penal Code.

Section 108 has been amended in 1923 so as to make it clear that the dissemination must be intentional to come within the mischief of the section.

Previous to the amendment the dissemination or attempt or abetment in connection therewith was contemplated to be done either orally or in writing but now it can be in any other manner but it must be intentional.

The maximum period for which bond could be taken under section 109 was extended to one year from six months.

The exemption of European British subjects from the operation of sections 109, 110 was kept intact.

Act XVIII of 1923 while keeping the general outline of section 110 intact enlarged its scope by including a forger in Clause (*a*) along with robber, house-breaker or thief and by bringing within Cl. (*d*) many more cases than before. Formerly under that clause a person who habitually commited mischief, extortion or cheating or counterfeiting coin, currency notes or stamps or attempted so to do was amenable to the jurisdiction of the Magistrate for the purpose of being required to furnish security for being of good behaviour. C. 1 (*d*) as now enacted contemplates a person who "habitually commits or attempts to commit or abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief or any offence punishable under Chapter XII of the Indian Penal Code

(*i.e.*, any offence relating to coin and government stamps) or under section 489 A, section 489 B, section 489 C or section 489 D of that Code.

By an amendment of Cl. 3 of section 117 re-enacted as Cl. 4 evidence of general repute has been made admissible to prove desperate and dangerous character besides habit as an offender.

For the first time in 1923 the exemption of European British subjects from the operation of sections 109 and 110 has been removed and section 111 which provided for such exemption has been repealed by section 8 of Act XII of 1923.

It is noteworhy that in amending the Code in 1923 the legislature has expressly laid down in sections 107 and 108 that on receipt of the information contemplated by the section the Magistrate may take action if in his opinion there is sufficient ground for proceeding but no corresponding change has been made in section 109 and 110 under which on receipt of information of the nature required by the section the Magistrate may take action. It is difficult to make out what the distinction if any at all is.

As regards imprisonment for failure to give security when the Code of 1861 was passed the law was silent as regards the nature of the imprisonment to be undergone by a person on failure to furnish security for being of good behaviour or for keeping the peace.

The practice followed by the various courts so far as can be gathered from the published rulings was not uniform. In Bengal, North Western Provinces and Oudh the words "shall be committed to prison" implied simple imprisonment. The Judicial commissioner of the Punjab on the other hand ordered that it should be rigorous but might be simple in the discretion of the Court concerned. In Madras, it appears, a curious state of things prevailed and it was left to the officer of the jail to use his discretion in the matter. Act X of 1872 set the matter at rest by enacting in the last clause of section 510 that imprisonment for failure to furnish security for good behaviour might be rigorous or simple as the Court or Magistrate in each case might direct and by enacting in section 497 that on failure

to furnish security for keeping the peace the Magistrate might order the person called upon to furnish security to be kept in simple imprisonment until the security required was furnished. The law on the subject was kept intact in the Code of 1882 as also that of 1898 as it stood before the amendment in 1923.

The amending Act of 1923 introduced the change that imprisonment for failure to furnish security demanded under sections 108 and 109 was to be simple in all cases and it was left to be rigorous or simple in the discretion of the Court in cases under sections 110.

By Act X of 1926 Cl. 6 of section 123 has again been amended so as to make the imprisonment in default of furnishing security for good behaviour in a case under section 108 simple and in the case of vagrants (under section 109) and bad characters (under section 110) rigorous or simple in the discretion of the Court .

Pending the completion of the inquiry as to the truth of the information on which the person concerned has been called upon to show cause against an order for furnishing security, power has been given by the amending Act of 1923 in Cl. (3) of section 117 to the Magistrate so that he, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing direct the person in respect of whom the order under section 112 has been made to execute a bond with or without sureties for keeping the peace or maintaining good behaviour until the conclusion of the enquiry and may detain him in custody until such bond is executed or in default of execution until the enquiry is concluded.

In consequence of this new clause (3) a proviso has been added in 1923 to section 496 whereby the obligation to grant bail to a person who is not accused of a non-bailable offence pending proceedings in Court against him has been removed from cases coming within Cl. (3) of section 117.

The law as to the power of the Magistrate to refuse to accept a surety was defective in so far as it was silent as to

the necessity of an enquiry before making an order of rejection. Section 122 as it stood before the amendment in 1923 laid down that the "Magistrate may refuse to accept any surety offered under this chapter on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person."

This section has been replaced by an entirely new one in which the case law on the subject laying down the necessity of an enquiry as to the fitness of a surety has been embodied. The power of the Magistrate extends to rejecting a surety previously accepted by him or his predecessor besides refusing to accept a surety offered on the ground that such surety is an unfit person for the purposes of the bond. Unfitness for the purpose of the bond is the criterion for rejecting a surety. The object of the bond is to prevent the commission of an offence by the person from whom the bond is taken and a surety, however substantial a man he may be, may be wholly unable to control the movements of the person for whom he stands surety and is an unfit person for the purposes of the bond and is to be rejected. The section lays down a complete procedure for an enquiry as to the fitness of a surety which must be on oath.

Provisions as to forfeiture of bonds are to be found in Chap. XLII of the Code. The amending Act of 1923 has introdused two new sections *viz.*, sections 514A and 514B.

The former deals with the procedure to be followed subsequent to insolvency or death of a surety or the forfeiture of a bond and the latter with bonds called for from minors.

Under section 514A when any surety to a bond becomes insolvent or dies or when any bond is forfeited fresh security in accordance with the directions of the original order may be called for by the Court by whose order the bond was taken or any Presidency Magistrate or Magistrate of the first class.

If such security is not furnished the Court or Magistrate calling for it may proceed as if there had been a default in complying with the original order.

When the person required to execute the bond is a minor the Court may accept in lieu thereof a bond executed by a surety or sureties only (section 514B).

This was so all along under section 118 proviso 3 so that section 514B does not effect any change so far as bonds under Chapter VIII are concerned.

More liberal provision for appeal than before has been made in amending the Code in 1923. Before the amendment any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour might appeal to the District Magistrate but now any person who has been ordered to give security whether for keeping the peace or for good behaviour may appeal to the High Court if the order has been made by a Presidency Magistrate and to the Sessions Judge if made by any other Magistrate. Power has been given to the Local Government to direct that in particular districts orders made by a Magistrate other than a Presidency or District Magistrate shall be appealable to the District Magistrate (section 406).

An order refusing to accept a surety or rejecting a surety previously accepted has for the first time been made appealable to the High Court if made by a Presidency Magistrate, to the Sessions Judge if made by the District Magistrate and to the District Magistrate if made by a Magistrate other than the District Magistrate (section 406A).

CHAPTER X.

GENERAL STATEMENT OF LAW RELATING TO SECURITY FOR GOOD BEHAVIOUR.

Jurisdiction of Magistrate.

Under Secs. 108, 109, 110 the Magistrates mentioned therein may on receipt of the necessary information against a person within the local limits of their jurisdiction require such person to show cause why he should not be ordered to execute a bond for good behaviour.

Even a Magistrate of the first class must be specially empowered in this behalf by the Local Government in order to be competent to take action under Secs. 108 and 110. All Magistrates of the first class can proceed under Sec. 109. Magistrates of the second and third class have no power to take action under Secs. 108, 109, 110. A Sub-Divisional Magistrate of the second class can however take action.

If a Magistrate not empowered in this behalf demands security for good behaviour his proceedings shall be void—Sec. 530 cl (d).

The person to be proceeded against must be within the local limits of the Magistrate's jurisdiction when action under the section is taken although he may not be resident within such limits

Action under the sections may be taken against European British subjects the exemption in whose favour in respect of proceedings under Secs. 109 and 110 has now been removed by the repeal of Sec 111 of the Code.

Nature of bond.

The maximum period for which a bond may be taken is three years under Sec. 110 and one year under Secs. 108 and 109. A bond under Sec 108 may be with or without sureties but one under Secs. 109 and 110 must be with sureties.

Initiation of proceedings.

In proceedings under the sections the Magistrate is bound to make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force and the number and character and class of sureties (if any) required (section 112).

If the person in respect of whom such order is made is present in court it shall be read over to him or if he so desires the substance thereof shall be explained to him (section 113).

If such person is not present in court the Magistrate shall issue a summons requiring him to appear or when such person is in custody a warrant directing the officer in whose custody he is to bring him before the court (section 114).

Every summons or warrant issued shall be accompanied by a copy of the initial order made and such copy shall be delivered by the officer serving or executing such summons or warrant to the person proceeded against. (Section 115).

When the person in respect of whom a proceeding has been started is present in court the Magistrate may require him to execute a bond with or without sureties for his appearance in his court. (Section 91).

Arrest and detention in custody.

In circumstances contemplated by the proviso to section 114 the Magistrate may at any time issue a warrant for the arrest of the person proceeded against. The Magistrate may in his discretion direct by endorsement on the warrant that if the person for whose arrest it is issued executes a bond with sufficient sureties for his attendance before his court at a specified time and thereafter until otherwise directed by him the officer executing the warrant shall take the security and release the person in question from custody (Sub-section 1 section 76).

The endorsement on the warrant shall state the number of sureties, the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound and the

time at which he is to attend before the court (section 76 Sub-section 2).

Bail.

When the person arrested in execution of the warrant issued under Sec. 114 is produced before the Magistrate he shall be released on bail if he is prepared to give bail. Such bail may be offered at any stage of the proceedings. The Magistrate may, if he thinks fit, instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance. (Sec. 496).

If the contingency contemplated by cl. 3 of section 17 arises and the Magistrate thinks it necessary to call for ad-interim security and such security is not a furnished the person arrested may be detained in custody. (Proviso Sec. 496).

Prior to the amendment of the Code in 1923 when the provision contained in Sub-section 3 of Sec. 117 was not in the Code there was absolutely no provision for detaining in custody a persom proceeded against under Sec. 110 who could furnish bail under Sec. 496.

Personal attendance of accused.

The personal attendance of the person proceeded against cannot be dispensed with by the Magistrate (except in circumstances contemplated by Sec. 540-A which may be said to be applicable in the view that the person proceeded against is an accused).

The enquiry.

In the presence of the person proceeded against the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary.

As a general rule judicial proceedings are held in open court. It is noteworthy however that Sec. 352 of the Code which enjoins courts to be open to the public is confined to the place in which any criminal court is held for the purpose of

enquiring into or trying any offence so that that section cannot have any application to a court in which an enquiry under Chap. VIII of the Code is held.

The final order.

If necessity for the bond is established in the enquiry an order is to be made as laid down in section 118 and if such necessity is not found to exist an order is to be made in terms of Sec. 119.

Ad-interim security.

Pending the completion of the enquiry ad-interim security may be taken in the circumstances contemplated by clause 3 of Sec. 117.

If the ad-interim security is not given the person proceeded against may be detained in custody until such security is given or in case of default until the enquiry is completed.

Joint enquiry.

Where two or more persons have been associated together in the matter under enquiry they may be dealt with in the same or separate enquiries as the Magistrate shall think just. (cl. 5 Sec. 117).

In order to prove that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community, in other words, to show that a person comes within any of the six clauses of Sec. 110 evidence of general repute is admissible along with other evidence. (cl. 4 Sec. 117).

Procedure of enquiry.

The enquiry is to be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases except that no charge need be framed (cl. 2 Sec. 117).

The taking of evidence.

When the person proceeded against appears or is brought before the Magistrate the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. (cl. 1 Sec. 252).

The Magistrate shall ascertain from the prosecution or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before himself such of them as he thinks necessary. (cl. 2 Sec. 252).

The person proceeded against shall be required to state at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit forthwith whether he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and after cross-examination and re-examination (if any) they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any) they also shall be discharged.

The person proceeded against shall then be called upon to enter upon his defence and produce his evidence.

If the person proceeded against puts in any written statement the Magistrate shall file it with the record. (Sec. 256).

[*N.B.* This will be the procedure in the view that Sec. 256 is applicable to security proceedings. See note under case law.]

An examination of the person proceeded against under Sec. 340 is not necessary.

If the person proceeded against after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing the Magistrate shall issue such process unless he considers that the application should be refused on the ground that it is made for the purpose of

vexation or delay or for defeating the ends of justice. Such ground shall be recorded by the Magistrate in writing.

The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court. (Sec. 257).

[*N.B.* This will be the procedure in the view that Sec. 257 is applicable to security proceedings. See note under case law.]

The court may at any stage of the enquiry summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined and the court *shall* summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. (Sec. 540).

Mode of recording evidence in the Muffassil.

The evidence of each witness shall be taken down in writing by the Magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate. (Sec. 356).

It shall be taken down in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question and answer. (Sec. 359).

When the evidence is not taken down by the Magistrate himself a memorandum of the evidence is to be kept and if the Magistrate is prevented from making a memorandum he shall record his reason of his inability to make it. (cl. 3, 4, Sec. 356).

As the evidence of each witness is completed it shall be read over to him in the presence of the person proceeded against and shall if necessary be corrected. (Sec. 360).

Under the ruling of the Judicial Committee in Abdul Rahman *vs.* King Emp. 31 C.W.N. 271 all depositions with the exception of formal ones should be read over to the witnesses in a manner so as to make it possible for the accused

or his pleader to listen to what is being read over and to attend to any correction made.

Whenever any evidence is given in a language not understood by the person proceeded against it shall be interpreted to him in open court in a language understood by him. (Sub-sec. 1 Sec. 361).

Where documents are put in for the purpose of formal proof it shall be in the discretion of the Court to interpret as much thereof as appears necessary. (Sub-sec. 3 Sec. 361).

In recording the evidence of a witness the Magistrate shall also record such remarks if any as he thinks material respecting the demeanour of such witness whilst under examination. (Sec. 363).

Mode of recording evidence in a Presidency Town.

In every case tried by a Presidency Magistrate such Magistrate shall either take down the evidence of the witness with his own hand or cause it to be taken down in writing from his dictation in open court. Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer. (Sec. 362).

The Magistrate shall make a memorandum of the substance of the examination of the person proceeded against. (Sub-section 2-A Sec. 362).

Every order for security whether for keeping the peace or for good behaviour being now appealable under Sec. 406 Sec. 362 has to be followed in every case of security under Secs. 107, 108 109, 110.

[*N.B.* Sub-section 2-A speaks of the substance of the examination of the accused and it is applicable to security proceedings in the view that the person proceeded against is an accused.]

Right to be defended by lawyer.

The person proceeded against may of right be defended by a pleader or a Mukhtar authorised under any law for the

time being in force to practise in the court of the Magistrate or by an advocate, a vakil or an attorney of a High Court so authorised or by any other person appointed with the permission of the Court to act in the proceeding. —Sub-section I Sec. 340 ; Sec. 4 cl. (r).

Person proceeded against not a competent witness.

The person proceeded against cannot offer himself as a witness in the proceeding.

Adjournment.

The hearing of the case may be adjourned from time to time under Sec. 344.

[*N.B.* Section 540A which provides for a case where one or more of several accused on trial is or are incapable of remaining before the Court will be applicable in the view that the person proceeded is an accused.]

Change of Magistrates.

If after evidence has been partly recorded by a Magistrate he is succeeded by another or the case is transferred to some other Magistrate the second Magistrate may act on the evidence recorded by his predecessor or partly recorded by his predecessor and partly by himself or he may resummon the witnesses and recommence the enquiry (Sec. 350).

As to the applicability of proviso (*a*) see under case law.

Final order a Judgment.

The order made under section 118 or Sec. 123 requiring security to be furnished by the person proceeded against is a judgment and should contain the points for determination and the decision thereon and the reasons for the decision and should be dated and signed by the presiding officer in open court at the time of pronouncing it.

[*N.B.* This shows that a security proceeding has to be tried in an open court although section 352 does not make the place of trial of such proceeding an open court.]

Commencement of bond.

If any person in respect of whom an order requiring security has been made is at the time such order is made sentenced to or undergoing a sentence of imprisonment the period for which such security is required shall commence on the expiration of such sentence.

In other cases such period shall commence on the date of such order unless the Magistrate for sufficient reasons fixes a later date. (Sec. 120).

Deposit of money not permissible in lieu of bond.

The person ordered to furnish security for good behaviour cannot be permitted to deposit a sum of money or Government promissory-notes in lieu of executing the bond called for.

Magistrate's power to reject surety.

Any security offered may be rejected by the Magistrate on the ground that he is *an unfit person for the purposes of the bond* in question. On this ground the Magistrate may also reject a surety previously accepted by him or his predecessor but before making an order of such a nature the Magistrate shall either himself hold an enquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him. (Sec. 122).

It is the Magistrate who made the order originally who will deal with any surety offered in pursuance of an order made on a reference under Sec. 123 by the Court of Session in the Muffassil or the High Court in a Presidency Town and the section which speaks of Magistrates only will cover the cases of such sureties.

Discharge of surety.

Any surety may at any time apply to a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class to cancel his surety bond. Such

Magistrate need not be the Magistrate of the court which made the order for the bond. On such application being made the Magistrate shall issue his summons or warrant requiring the person for whom the surety is bound to appear or to be brought before him and on his appearance or production the bond shall be cancelled. (Sec. 126, 126A).

Imprisonment in default of security.

If the security required is not furnished the person ordered to furnish the security shall be committed to prison or if he is already in jail shall be detained in prison until the period of the bond expires or the security is furnished. (cl. 1 Sec. 123).

Where a person who has been sentenced to imprisonment in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order the latter sentence will commence immediately. (Proviso 2 Sec. 397).

Imprisonment for failure to give security for good behaviour shall when the proceedings have been under Sec. 108 be simple and when the proceedings have been taken under Sec. 109 or 110 be rigorous or simple as the Court or Magistrate in each case directs. (Cl. 6 Sec. 123).

Tender of security to jailer.

If the security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Magistrate who made the order and shall await the orders of such Magistrate. (Sub-section 4 Sec. 123).

[*N.B.* In cases disposed of by a higher court under Sec. 123 or in appeal it is the Magistrate who made the order in the first instance who is to be referred to. He is to decide whether or not to accept the security tendered. A surety offered to the jailer must be produced before the Magistrate who if he refuses to accept the surety must follow the provision laid down in Sec. 122.]

Special powers of District Magistrates and Chief Presidency Magistrates.

The District Magistrate and the Chief Presidency Magistrate can discharge any person imprisoned for failure to give security for good behaviour if he is of opinion that such person may be released without hazard to the community or to any other person. This power they can exercise even where the order for security was made by a superior Court.

The order of release may be clogged with conditions nonfulfilment of which may result in a cancellation of the order of discharge whereupon the person released may be arrested by any Police Officer without warrant and produced before the Magistrate concerned. Furnishing security for the unexpired period of the bond always secures release from custody. (Sec. 124).

In cases of imprisonment in default of furnishing security the District Magistrate and the Chief Presidency Magistrate can reduce the amount of the security or the number of sureties or the time for which security has been required. But this they can do only when the order was not made by a superior Court. (Sec. 124).

The District Magistrate and the Chief Presidency Magistrate have plenary powers to cancel at any time any bond for good behaviour executed by order of any court in his district not superior to his court. (Sec. 125).

Breach of bond.

The commission or attempt to commit or the abetment of any office punishable with imprisonment wherever it may be committed is a breach of the bond. (Sec. 121).

Forfeiture of bond.

Sec 514 provides the procedure on forfeiture of a bond and Sec. 514-A that on insolvency or death of a surety.

Reference to higher court.

Whenever the period of the bond required is more than one year and the security is not furnished the Magistrate making the order is to detain the person proceeded against in prison pending the order of the Sessions Judge and in the case of a Presidency Magistrate of the High Court. On such reference being made the higer court may after examining the proceeding and requiring from the Magistrate any further information or evidence which it thinks necessary pass such order in the case as it thinks fit. The period for which any person is imprisoned for failure to give security shall not in any case exceed three years. (Sec. 123).

If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court such reference shall also include the case of any other of such persons who has been ordered to give security and the cases of such persons shall be dealt with exactly in the same manner as that of the person in respect of whom the reference has been made. (Cl. 3-A Sec. 123).

Appeal.

In all cases of security under Sec. 118 of the Code in the Muffassil an appeal lies to the Court of Session and where the order is made by a Presidency Magistrate to the High Court. The Local Government may direct that in any District appeals shall lie to the District Magistrate instead of to the Sessions Judge. (Sec. 406).

No appeal lies in a case in which the matter has been before the Sessions Judge on reference. (Sec. 406).

Any person aggrieved by an order refusing to accept or rejecting a surety may appeal against such order if made by a Presidency Magistrate to the High Court, if made by the District Magistrate to the Court of Session and if made by Magistrate other than the District Magistrate to the District Magistrate. (Sec. 406A).

An appeal lies on a matter of fact as well as a matter of law. (Sec. 418).

An appeal is to be made in the form of a petition. (Sec. 419).

If the appellant is in jail he may present his petition of appeal to the officer in charge of the jail. (Sec. 420).

An appeal may be summarily dismissed. (Sec. 421).

The appellate Court may alter or reverse the order for security or make any amendment or any consequential or incidental order that may be just and proper. (Sec. 423).

The appellate Court may if it thinks necessary take additional evidence or cause it to be taken by a Magistrate. This Magistrate need not be the trying Magistrate. (Sec. 428).

In the High Court in case of difference of opinion between two Judges composing a bench the appeal shall be heard by a third Judge whose opinion will dispose of the case. (Sec. 429).

All orders passed on forfeiture of a bond by any Magistrate other than the District Magistrate are appealable to the District Magistrate or if not so appealed may be revised by him.

There is no provision for an appeal against such an order made by a Presidency Magistrate. (Sec. 515).

No additional evidence can be taken in an appeal under section 515 for section 428 which deals with the taking of additional evidence applies only to appeals under Chapter XXXI of the Code.

Revision by High Court.

All orders for security may be revised by the High Court which in revision can exercise all the powers of an appellate Court. (Secs. 435, 439).

Proceedings pending before a Magistrate may be quashed by the High Court and for this purpose the Sessions Judge or the District Magistrate may make a report to the High Court under section 438 after calling for the records under section 435.

Where the record of a proceeding before a Presidency Magistrate is called for by the High Court under section 435 the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue and the High Court is bound to consider such statement before overruling or setting aside the decision of the Magistrate. (Sec. 441).

Transfer of proceeding.

A proceeding for good behaviour may be transferred by the Chief Presidency Magistrate or District Magistrate or Sub-Divisional Magistrate under sections 192 and 528 and by the High Court under section 526.

Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer a proceeding for good behaviour of which he has taken cognizance to a subordinate Magistrate. (Sec. 192).

Any Chief Presidency Magistrate, District or Sub-Divisional Magistrate may withdraw a proceeding, for good behaviour from or re-call such a case which he has made over to any Magistrate subordinate to him and may try such case himself or refer it for trial to any other Magistrate competent to enquire into or try the same. (Sec. 528).

The High Court may transfer a proceeding for good behaviour whether in its original or appellate stage from a criminal Court subordinate to its authority to any other such criminal Court of equal or superior jurisdiction or may transfer it to itself and try it. (Sec. 526).

CHAPTER XI

SECURITY FOR GOOD BEHAVIOUR FROM PERSONS DISSEMINATING OFFENSIVE MATTER

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108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits either orally or in writing, *or in any other manner intentionally* disseminates or attempts to disseminate, or in any wise abets the dissemination of,—

(*a*) any seditious matter, that is to say, any matter the publication of which is punishable under Section 124A of the Indian Penal Code, or

(*b*) any matter the publication of which is punishable under Section 153A of the Indian Penal Code or

(*c*) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code.

such Magistrate *if in his opinion there is sufficient ground for proceeding may* (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for good behaviour for such period not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under *and edited, printed and published* in conformity with, the rules laid down in the Press and Registration of Books Act, 1867, *with reference to any matter contained in such publication* except by the order or under the authority of the Governor-General in Council or the Local Government or some officer empowered by the Governor-General in Council in this behalf.

Sec. 108 was enacted for the first time in the code of 1898.

A Sub-divisional Magistrate who is a Magistrate of the second class cannot take action under section 108. Even a Presidency Magistrate or a Magistrate of the first class must be specially empowered by the Local Government in this behalf. The power to require security for good behaviour under section 108 is one of the ordinary powers of the District Magistrate and the Chief Presidency Magistrate only.

Scope of section 108.

The information on which the Magistrate can take action must be to the effect that there is within the limits of his

jurisdiction a person who intentionally disseminates or attempts to disseminate or in any way abets the dissemination of any seditious matter, *i.e.*, any matter the publication of which is punishable under section 124A I. P. C. or of any matter likely to promote feelings of enmity or hatred between different classes of His Majesty's subjects, *i.e.*, any matter the publication of which is punishable under section 153A I. P. C. or of any matter concerning a judge which amounts to criminal intimidation or defamation, *i.e.*, any matter concerning a judge which is punishable as coming within the mischief of section 503 or section 499 I. P. C.

Sections 124A, 153A, 499, 503 I. P. C.

124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

153. Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Explanation.—It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of Her Majesty's subjects.

499. Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(*a*) A says—"Z is an honest man; he never stole B's watch:" intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(*b*) A is asked who stole B's watch, A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(*c*) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, usless it fall within one of the exceptions.

First Exception.—It is not defamation to impute anything

which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, so far as his character appears in that conduct, and no further.

Illustrations.

(*a*) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses

respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says—"I do not believe what Z asserted at that trial because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(e) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a week man and a libertine," A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith

those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration.

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father A is within this exception.

Ninth Exception.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations.

(*a*) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(*b*) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

503. Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any

act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation —A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

Dissemination may be oral written or otherwise but must be intentional.

The dissemination of the offending matter or the attempt or abetment in connection therewith may be oral or in writing or in any other manner but it must be intentional.

While enlarging the scope of the section in 1923 by removing the limitation of the dissemination or the attempt or abetment in connection therewith being only oral or written the legislature has expressly added that it must be intentional. The words "orally or in writing disseminates or attempts to dissemiate or in any way abets the dissemination of" have been changed to "either orally or in writing or in any other manner intentionally disseminates."

The dissemination or the attempt or abetment in connection therewith need not be within the local limits of the Magistrate's jurisdiction but may be without such limits as well but in order to have jurisdiction the person to be proceeded against must be within the limits of the Magistrate's jurisdiction. No question of residence within the limits of the jurisdiction arises. It is enough if the person to be proceeded against is within the limits of the Magistrate's jurisdiction when action is taken.

The publication of any matter concerning a judge which amounts to criminal intimidation or defamation under the Indian Penal Code comes within the perview of the section.

Any matter concerning a judge.

The word "judge" is not defined in the Code of criminal procedure but under sub-section 2 of section 4 all words and expression used in the Code of Criminal Procedure and defined in the Penal Code and not defined in the Criminal Procedure Code shall be deemed to have the meaning attributed to them by the Penal Code.

Under section 19 I. P. C. the word judge denotes not only every person who is officially designated as a judge but also every person who is empowered by law to give in any legal proceeding civil or criminal a definite judgment or a judgment which if not appealed against would be definitive or a judgment which if confirmed by some other authority would be definitive or who is one of a body of persons which body of persons is empowered by law to give such a judgment.

The important point to be noticed in connection with this definition is the definitive character of the judgment which the officer in question is entitled to deliver. Illustration (*d*) section 19 I. P. C. is on this point. It says "A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court is not a judge."

Sec. 4 Sub-section 2 Cr. P. C.

Words which refer to acts done, extend also to illegal omissions ; and all words and expressions used herein and defined in the Indian Penal Code, and not herein-before defined, shall be deemed to have the meanings respectively attributed to them by that Code.

Sec. 19 I. P. C.

The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment

which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(*a*) A Collector exercising jurisdiction in a suit under Act X of 1859 is a Judge.

(*b*) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.

(*c*) A member of a panchayat which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits is a Judge.

(*d*) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

Peculiar nature of the provision in section 108.

"Sec. 108 together with Sec. 110 as enacted in the Code of 1898 introduced a new principle into part IV of the Code which is described in the heading as for the prevention of offences. Acts for which security can be taken for good behaviour under Secs. 108, 110 are offences actually committed and it would therefore be only for the repetition of any such offence that security taken could be properly regarded as an order in prevention of that offence. It should be noted that although no court can take cognizance of an offence under Sec. 124-A or Sec. 153-A I. P. C. unless upon complaint made by order of or under the authority of the Governor General in Council, the Local Government or some officer empowered by the Governor General in this behalf proceedings can be taken under Sec. 108 for security for good behaviour for the same offences without any such special authority except in respect of a matter coming within the last sub-section." (Princep's Code of Criminal Procedure, 14th Edition.)

Proceeding against editor proprietor &c., of newspaper.

The last sub-section makes it imperative that proceedings against the editor, proprietor, printer or publisher of any publi-

cation registered under and edited, printed and published in conformity with the rules laid sown in the Press and Registration of Books Act 1867 with reference to any matter contained in such publication shall not be taken except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor-General in Council. The words "edited printed and published" and "with reference to any matter contained in such publication" in the last sub-section have been added by the amending Act of 1923.

Procedure.

The procedure to be followed is exactly the same as in an enquiry under Sec. 110 and all the provisions applicable to that enquiry are applicable to one under Sec. 108. (See Sec. 117 at page 37).

The bond.

The maximum period for which bond may be taken is one year and the bond may be with or without sureties.

Amendment of 1923.

Sec. 108 has been amended in two respects, *viz.*, (1) dissemination may be otherwise than oral or written but it must be intentional (2) action may be taken by the Magistrate only when in his opinion there is sufficient ground for proceeding.

In amending the Code in 1923 the legislature has in Sec. 108 as also in Sec. 107 of the Code added the words "if in his opinion there is sufficient ground for proceeding".

Formerly the sections were to the effect that one of the Magistrates mentioned in the sections on receipt of certain information might require the person informed against to show cause why he should not be ordered to execute a bond and now they are to the effect that such Magistrate on receipt of the information may "if in his opinion there is sufficient ground for proceeding" require the person informed against to show cause why he should not be ordered to execute a bond.

(N.B. As to the effect of the amendment see earlier note under Administration of Sec. 107).

Administration of Sec. 108.

This section which was enacted for the first time in the Code of 1898 and which was not found necessary for a long time since the passing of the first Code of Criminal Procedure in 1861, provides, to quote the words of the eminent counsel who argued the case for the petitioner in Veni Bhushan Roy *v.* Emp. 34 Cal. 991 S.C. II C.W.N. 1050 S.C. 6 C.L.J. 699, a fine mode of bringing a man under the grip of the authorities without trying him for the substantive offence he is alleged to have committed.

Veni Bhushon Roy vs. Emp. 34 Cal. 991.

In this case the District Magistrate of Khulna issued the order under Sec. 144 Cr. P. C. prohibiting the meeting of the District conference at Khulna. Against that order an application was made to the High Court which issued a rule upon the District Magistrate to show cause why the aforesaid order should not be set aside. The District Magistrate thereupon cancelled the order. Subsequently the District conference met at Khulna and the petitioner a local pleader as chairman of the Reception Committee read out a written speech. In the course of this speech the petitioner asked the audience to secure "Swaraj". It was held by Saroda Charan Mitra and Fletcher J.J. that "the word 'Swaraj' does not necessarily mean Government of the country to the exclusion of the present Government. Its literal meaning is self-Government and its ordinary acceptance is home-rule under the Government." Their Lordships held that looking at the substance and not the exact words of the speech in question there was nothing that would bring the petitioner under Sec. 124-A I. P. C. or of section 108 cl. (*a*) Cr. P. C. and therefore the petitioner could not be bound down to be of good behaviour.

Emp. vs. Vaman II Bom. L. R. 743—test under the section.

The test under Sec. 108 is whether the person proceeded against has been disseminating seditious matter and whether there is fear of the repetition of an offence. In each case that is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances.

In this case the last of the speeches was made on 5th September 1908 and the information was filed on 10th December 1908 and it was held that the District Magistrate was right in making the order.

It was also held that the Magistrate was right in not accepting the undertaking of the petitioner not to deliver speeches for a year if the case was dropped. The case being criminal the Magistrate was right in conforming to the provision of the law strictly before passing an order under the section

Sital Prosad vs. King Emp. 43 Cal. 591—intention as required by Sec. 153-A I. P. C. immaterial.

In Sital Prosad *v.* King Emp. 43 Cal. 591 S C. 20 C. W. N. 199 S C. 23 C L.J. 105 it was held that in order to justify an order under Sec. 108 cl. (b) one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred and once one has got those words present there is no necessity for finding intention such as would be necessary if the person was placed under his trial under Sec. 153(A).

In this case the petitioners were called upon to furnish security under Sec. 108 for having circulated a leaflet called "Apna Sanaton Dharma Pachano" containing passages calculated to create ill-feeling between Hindus and Mahomedans and having thereby attempted to promote hatred and enmity between the two classes. Their Lordships observing that the law was as stated above held as follows—"The result is that we have simply to look to the actual words of the leaflet to see if there are words which in our opinion are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed

to call backsliders from the true Hindu faith to a sense of their misdeeds. If the words of the leaflet had been confined to this there would have been nothing in respect of which the petitioner could have been bound down under Sec. 108 but it seems to us when we read the leaflet we find that there are passages which go far beyond the object above mentioned, if that had been the only object. For instance there was no necessity to refer, as the leaflet does, to members of the Mahomedan faith as beef-eaters and destroyers of the Vedas and the Shastras. The passage which specifically seems to us unnecessary for the alleged purpose of the pamphlet is as follows—"Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down and the images of our gods and goddesses have been burnt, for heating *hamams*, for providing hot baths? Many places of pilgrimage have been destroyed for the construction of mosques and mosques built on the sites; crores of beneficial cows have been killed and crores of ignorant widows or orphans and the helpless are deprived of their religion by misleading and enticement". These facts may be true historically or not and in the history of any country or of any community or religion there are passages which are best left uncalled It seems to us therefore that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between Hindus and members of the Mahomedan religion "

In laying down the law as to the difference between Sec. 153-A I. P. C. and Sec. 108 Cr. P. C. so far as question of intention is concerned their Lordships refused to accept the view of Sec. 108 Cr. P. C. taken by the Chief Court of Burma in Dhamaloka *v.* Emp. 4 Burma Law Times 84 S. C. 12 Cr. L. J. 248 according to which in order to sustain an order under Sec. 108 (*b*) it is not sufficient to prove that the language used was highly offensive to a community but it must be shown that the person proceeded against intended to provoke feelings of enmity or hatred between two communities, although it is not necessary that he should have succeeded in exciting such feelings if deliberate intention to do so can be inferred. In the

same case it is observed as follows—"Preachers are at liberty to decant on the errors of other religions and extol their own faith to the skies but they may not consciously inflame the minds of their hearers by holding up the ministers and followers of other religions to public execration.

What may be harmless if printed in an English book may be highly inflamatory when translated into an oriental language and served out with spicy comments to an audience of orientals in a public address.

In estimating the intention and probable effect of a man's public utterances it is proper to consider not merely the personality of the speaker but the tone and spirit of the speeches and also the circumstances in which he spoke."

P. K. Chakravarty vs. King Emp. 30 C. W. N. 953—intention as required by Sec. 153-A absolutely necessary.

The view about intention being immaterial has not been accepted in the latest case in which the matter has been exhaustively dealt with and which may be taken to be the leading case on the subject, (P. K. Chakravarty *v.* King Emp. 30 C. W. N. 953).

The appellant who was the editor of a newspaper called the "Forward" published therein an article headed "Yellow Urdu Leaflet; attempts at incitement; will Mahomedan leaders intervene?" in which he animadverted on a pamphlet in Urdu circulated for the benefit of the Mahomedans. In the body of the article an English translation of the pamphlet was printed as also a transliteration in English letters of the original Urdu and it was observed that the pamphlet was being circulated and it was not difficult to trace the source from which it emanated. The appellant added—"Let us wait and see what steps the guardians of law and order take in the matter." For this the appellant was proceeded against under Sec. 108 Cr. P. C. and ordered to enter into his own recognizance in the sum of Rs. 500/- to be of good behaviour.

It was held as follows:—"The utmost that is warranted on any view of Sec. 108 Cr. P. C. is that a person comes within

its scope if he disseminates matter which reveals an intention to promote feelings of enmity between classes.

Where there is no such intention the mere publication of news which is of such a character that it is possible to suppose that some people reading it may momentarily or foolishly be induced to entertain unreasonable feelings towards a class of other people is not enough to bring it within the mischief either of Sec. 153A. I. P. C. or of Sec. 108 Cr. P. C.

It is not for the criminal courts to abandon "intention" the ancient and statutory test and to put in peril of their process persons of innocent intention.

If the legislature meant to say that a Magistrate could proceed under Sec. 108 Cr. P. C. against any person who was found to have disseminated matter which in the opinion of the Magistrate had a tendency to promote class hatred it would have said this very plainly in terms very different from those which it has employed. If the person proceeded against under Sec. 108 of the Code of Criminal Procedure is innocent under Sec. 153A I. P. C. he does not come under the former section as a person disseminating matter the publication of which is punishable under Sec. 153A. I. P. C.

Sec. 108 Cr. P. C. seems to assume that one has only to look at the matter to tell whether its publication is punishable or not. This is broadly true no doubt, but it is not the truth and it ill consists with Sec. 153-A I. P. C. under which no matter is set aside or classified except with reference to the intention of the particular person accused.

Sec. 153A I. P. C. does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words "Promotes or attempts to promote feelings of enmity" are to be read as counting a successful or unsuccessful attempt to promote feelings of enmity. It must be for the purpose or part of the purpose of the accused to promote such feelings and if it is no part of his purpose the mere circumstances that there may be a tendency is not sufficient.

The internal evidence of the words used and the meaning of the words used will very generally be decisive of the question

whether or not the court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared, also if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words used. But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test.

Whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves but other evidence can also be looked at. The explanation to the section shows quite conclusively that in any matter on which other evidence could assist it may be taken.

An explanation is not the same as a proviso. The explanation to Sec. 153-A I. P. C. cannot be used to enlarge the provisions of the substantive section any more than a proviso can be used to enlarge the provision to which it is a proviso, such things are put in constantly to enable certain classes of people to feel safe that the section will not penalise them if they are acting in a certain manner."

"Emp. vs. Pitre 47 Bomb. 438—mere authorship not enough—dissemination."

The mere authorship of a printed pamphlet is not sufficient to bring a person under Sec. 108. It is dissemination that comes under that section. There is no presumption that a pamphlet was written by the person whose name appears as the author in the print. When a person has declared that he is the keeper of the Press, from that it does not follow that he must have been aware of the contents of a seditious pamphlet printed therein. A person whose name appears as publisher may be presumed to have knowingly disseminated the seditious matter.

CHAPTER XII.

SECURITY FOR GOOD BEHAVIOUR FROM VAGRANTS AND SUSPECTED PERSONS

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109. Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class receives information—

(*a*) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(*b*) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself.

such Magistrate may, in manner hereinafter pro-

vided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

The Magistrates mentioned in the section may take action on receipt of information that a person is taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction and there is reason to believe that such person is taking such precaution with a view to committing any offence or that there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself.

Merely taking precautions to conceal one's presence is not sufficient, there must be circumstances under which there is reason to believe that such person is taking such precautions with a view to committing any offence.

Three calsses of persons come within the purview of the section, *viz.* a person concealing his presence in the manner mentioned, a person who has no ostensible means of livelihood and a person who cannot give a satisfactory account of himself.

The Police both within and without the Presidency Towns have power under section 55 of the Code of criminal procedure to arrest vagrants and suspected persons and reputed habitual offenders.

(For preventive powers of the Police see sections 55 and 149 to 153 at pages 71 to 73).

Procedure.

The procedure is exactly the same as in an enquiry under section 110. (See section 117 at page 37).

The bond.

The maximum period for which bond may be taken is one year and the bond for good behaviour must be with sureties.

ADMINISTRATION OF SEC. 109.

Section when applicable.

Magistrates are competent to put in force the provisions of section 109 Cr. P. C. whenever they have credible information that the accused had no ostensible means of livelihood or was unable to give a satisfactory account of himself and will be within the limits of their jurisdiction in trying the case irrespective of the manner in which it comes before them. *Solicitor to the Government of India* v. *Madho Dhobi, 31 Cal. 557 S. C. 7 C. W. N. 662*).

The application of cl. (*a*) to section 109 is not limited to cases where a person has not been brought under arrest. It may apply to the case of a person arrested by the Police under section 55 Cr. P. C. (*Rambirich Ahir* v. *King Emp. 1926* Pat. *290*).

Scope of the section—observation of Page, J.

The salutary provisions of this section are so stringent that it may be made an engine of oppression unless care is taken by Magistrates to prevent its abuse. The object of the section is "to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction." "But" as pointed out by Page, J. in *Victor* v. *Emp. 30 C. W. N. 380,* "merely to be penniless or out of work is not an offence—many an honest man may find himself in either predicament—and in a country where there are workless people but no workhouses and casual labourers but no casual works if it were the law that persons are exposed to proceedings under section 109 (*b*) merely because they cannot give a satisfactory account of the manner in which they are eking out a precarious existence the Magistrate's hands would be full indeed and much injustice might be done to innocent persons. If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under section 109 unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means. Again if proceedings under section 109 (*b*) are

taken against a person because he "cannot give a satisfactory account of himself" the Magistrate would not be justified in passing an order under section 118 merely because the accused is unable to prove that he spends his time or at least his leisure hours in a satisfactory manner. In such a case the prosecution must satisfy the Magistrate that suspicion that he is living dishonestly attaches to the accused because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, *e.g.*, if he fails to account for being discovered in the company of persons living a dishonest or criminal life or detected in some place where he has no legal right to be. But the poor and the outcast and the old offender must somewhere live and move and have their being and a person who is passing the time in a particular place to all outward appearances innocently and in a manner void of suspicion is not brought within the ambit of section 109 (*b*) merely because he is unable to prove that he was working for his living."

(Victor vs. Emperor 30 C. W. N. 380).

In this case referred to above, on a particular day in the forenoon the appellant was arrested by a police officer in Lindsay Street, Calcutta. He was unable to satisfy the police that he was doing any work or to provide them with the address of any place where he was residing. The only information which he gave to the police to account for his presence in Lindsay Street on that morning was that two or three days previously he had come to Calcutta from outside. He was straightway taken to the thana, hauled before a Magistrate remanded pending enquiries and finally ordered to execute a bond for Rs. 100/- to be of good behaviour for one year and in default to suffer simple imprisonment for one year or until the security was furnished.

Sheikh Piru vs. King Emp. 41 C. L. J. 142—observations of Cuming and Mukherjee J. J.

In Sheikh Piru *v.* King Emp. 41 C. L. J. 142 Cuming J. observed as follows "I have noticed a tendency of late to abuse

the provisions of section 109 and to use it in a manner in which it was never intended to be. Any one acquainted with Calcutta is aware that there is a large floating population mostly of the cooly class. These people have no place of abode. They spend the night in verandahs and doorways and eat where they can. During the day they work as coolie. For such people to prove to the satisfaction of the court that they have work is well nigh impossible. The only people who could give any evidence on the point are probably not known to the person proceeded against for they are possibly employed by several persons in one day as casual labourers whose name and residence are unknown to them and who certainly would not remember they had employed him. They may be working quite honestly but it is very difficult if not impossible to prove it. To call on such persons to give security is to perpetuate a farce. No one is going to stand security for a homeless cooly."

In the same case Mukherji, J. remarked "Of late we have been receiving an unusually large number of appeals from persons who have been sent to jail by the Presidency Magistrate of Calcutta on failure to furnish security under section 118 read with section 109 and we ought to observe that we have found that in many of the cases the provisions of the law have been altogether misapplied. We cannot but attribute this state of things to a misapprehension of the true import of section 109 and ignorance of the procedure which the Amending Act of 1923 has introduced in the Code."

In this case the appellant Shiekh Piru was loitering in Strand Road at 2 a.m. and caught by a constable as he attempted to conceal himself.

The Magistrate came to the following finding "Accused is a confessed old offender with eleven convictions (five for theft alone). He has no work or place to live in. Fit object to be bound over under section 109 Cr. P. C."

The High Court set aside the order and held that an attempt to conceal oneself to avoid observation does not come within the provision of section 109 Cr. P. C.

Previous conviction how far justifies proceeding.

The fact that a man does not work or that he has been once before convicted for bad livelihood does not justify a Magistrate without being satisfied on evidence that since his release the accused has no ostensible means of livelihood to order him to furnish security for good behaviour. (*Qe.* v. *Poona Agarwala 5 C. W. N. 28*).

The mere fact that a person has previous conviction (of theft or otherwise) is not of itself sufficient reason for calling a man to give security under Sec. 109. (*Sheikh Piru* v. *King Emp. 41 C. L. J. 142*).

Give a satisfactory account of himself.

The words "give a satisfactory account of himself" do not mean that a person spends his time or at least his leisure moments in a satisfactory manner. Hence a person who is a peon in the employ of the Municipality and whose occupation and place of residence are well known but who according to the Magistrate "moves about at night, associates with scoundrels, bolts from the place and is armed with and uses a lathi" cannot be proceeded against under Sec. 109. (*Shariff Ahmad* v. *King Emp. 8 A. L. J. 1097 S. C. 12 Cr. L. J. 536*).

The expression "give a satisfactory account of himself" does not mean that the person should satisfy the Magistrate how he spends his time but means that he has to satisfactorily account for his presence within the limits of the Magistrate's jurisdiction. If a person is found within such limits or is present at a place within such limits to which place he does not belong and there are circumstances justifying a suspicion that he is there not for an innocent purpose he has got to explain his purpose. (*Sheikh Piru 41 C. L. J. 142 per Mukherji, J.*

The whole object of cl. (*b*) of Sec. 109 is to enable Magistrates to take action against suspicious looking strangers within their jurisdiction. (*Satish Chandra* v. *Emp. 39 Cal. 456 S. C. 16 C. W. N. 499 S. C. 15 C. L. J. 306*).

Without ostensible means of livelihood.

As long as a young man out of employment is staying in his father's house and that father is a man of substance able if necessary to support him he cannot be said to be without ostensible means of subsistence. (*Satish Chandra* v. *Emp.* 39 *Cal.* 456 *S. C.* 16 *C. W. N.* 499 *S. C.* 15 *C. L. J.* 396).

A group of persons with their families were camping in an open ground in the city of Meerut. They were there for manual works. The men were run in under cl. (*b*) of Sec. 109. It was found that they had money with them, but they were residents of Bindki, district Fatepur, that they had money in deposit with banks there and that their occupation was to go about selling cattle for about eight months in the year after which they returned to their homes in the rainy season. It appeared that they had arrvied at Meerut on their way back from a cattle fair. It was found that they had done no trade in cattle while in Meerut.

It was held that the men had ostensible means of subsistence and had given a satisfactory account of themselves. (*Nanka* v. *Emp.* 18 *A. L. J.* 321 *S. C.* 21 *Cr. L. J.* 366).

Conceal his presence.

The whole of cl. (*a*) of Sec. 109 must be read together and the object of the concealment must be with a view to committing some offence. (*Satish Chandra* v. *Emp.* 39 *Cal.* 456 *S. C.* 16 *C. W. N.* 499 *S. C.* 15 *C. L. J.* 396. *Rambirich Ahir* v. *King Emp.* 1926 *Pat.* 290).

An attempt to conceal oneself to avoid observation does not come within clause (*a*) of Sec. 109. (*Sheikh Piru* v. *King Emp.* 41 *C. L. J.* 142).

Sec. 109 (*a*) refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. Passing under a false name or taking precautions to conceal his presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause; such precautions for the purpose of conceal-

ment must be taken with a view to commit an offence. (*Sheikh Piru 41 Cr. L. J. 142*).

A mere attempt to avoid the police does not come within the mischief of cl. (*a*) of Sec. 109. (*Rambirich Ahir* v. *King Emp. 1926 Pat. 290 ; Gangoo* v. *Emp. A. I. R. 1926 Lahore 368*) but in Rambirich Ahir it has been held that Sec. 109 (*a*) does not require that it must in all cases be proved that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. In *Preo Nath Dutt* v. *Emp. 15 Cr. L. J. 255,* it has been held that a person who gives a false name and gives letters secretly containing incitements to crime or demanding money for committing of crimes falls within cl. (*a*) of Sec. 109.

There must be some definite attempt at concealment by taking precautions with that object in view whether it be by disguise or otherwise indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction which would bring the case within the purview of Sec. 109 (*a*) (*Rambirich Ahir* v. *King Emp. 1926 Patna 290*). Where the accused was found at half past nine talking to a number of other men some of whom are proved to have been persons of bad character in a garden close to a public railway station it was held that this fact alone was no evidence that he was taking precautions to conceal his presence (*Rambirich Ahir*).

When the petitioner who was by profession a Kaviraj was found at about midnight in a lane in a town with two others who had house-breaking instruments in their possession and who on being discovered fled and on arrest he remained silent and gave a false explanation of his presence in the spot. It was held by Teunon J. that the facts found did not bring the petitioner within either clause (*a*) or clause (*b*) of Sec. 109 as the petitioner's presence within the Magistrate's jurisdiction was well-known. It was held by Huda J. that clause (*a*) of Sec. 109 refers to a continuous act and does not therefore apply to a case when there is a momentary effort at concealment to avoid arrest or detection. (*Rishu Kabiraj* v. *Emp. 22 C. W. N. 163 S. C. 27 Cal. L. J. 382*).

If a person is accosted by the police while going away from a village and gives a false name in the first instance and then gives the correct name afterwards it was held that that fact itself did not amount to taking precaution to conceal his presence with a view to committing an offence. (*Sheo Prosad* v. *Emp. 21 A. L. J. 847*).

Where it was found that accused had gone to a village with the object of cheating some unwary villager but the facts did not show that accused was trying to conceal his presence it was held that the accused could not be bound down under Sec. 109 (*a*). *Sheo Prosad* v. *Emp. 21 A. L. J. 847*).

Other cases where Section held inapplicable.

The section was held not to apply to a case where three respectable residents of Delhi who came to Meerut by a night train were found on the road between the station and the city near to the place where a burglar's jimmy was found. (*Ghulam Jilani* v. *Emp. 17 A. L. J. 432 S. C. 20 Cr. L. J. 401*).

This case has been distinguished in *Abdul Rashid* v. *Emperor 64 Ind. cases 141* where it has been held that a person who has no means of his own but is maintained by his father who earns his honest living cannot be said to be a person who has no ostensible means of subsistence within the meaning of Sec. 109. But if on being arrested under suspicious circumstances he gives a name and address which are found to be wrong he does not give a satisfactory account of himself and that would justify proceedings against him under Sec. 109.

It has been held that subsistence by the conduct of any game is no ground for demanding security under Sec. 109 (*Bangoli* v. *Emp. 40 Cal. 702 S. S. 17 C. W. N. 883*).

The fact that a person had previously been connected with any criminal conspiracy or might still be in correspondence with any criminal outside the jurisdiction would not be relevant in a case under Sec. 109. (*Satish Chandra* v. *Emp. 39 Cal. 456 S. C. 16 C. W. N. 499*)

Confiscation of property.

Under Sec. 517 (1) Cr. P. C. the powers of a Criminal Court to order the disposal of property produced before it are now wider than under the Code of 1882 and a Criminal Court can now confiscate any property produced before it even though there is no proof that an offence has been committed in respect of such property or that such property has been used for the commission of an offence.

But unless there are strong grounds for holding that the properties found with a person dealt with under Sec. 109 alone of the Criminal Procedure Code are either themselves stolen property or the product of their conversion an order by a Criminal Court directing their confiscation would be unjustifiable. ' (*Pyde Rammanna Inre. 42 Mad. 9 S. C. 24 M. L. T. 256*).

CHAPTER XIII.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS.

110. Whenever a Presidency Magistrate, District Magistrate or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

(*a*) is by habit a robber, house-breaker, thief, *or forger, or*

(*b*) is by habit a receiver of stolen property knowing the same to have been stolen, or

(*c*) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(*d*) *habitually commits, or attempts to commit, abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code or under S. 489 A, S. 489 B., S. 489 C or S. 489 D of that Code, or*

(*e*) habitually commits, or attempts to commit or abets the commission of, offences involving a breach of the peace, or

(*f*) is so desperate and dangerous as to render his being at large without security hazardous to the community.

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should

not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

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Object of Proceeding under the section.

Action taken under section 110 of the Code of Criminal Procedure is intended to be preventive and not punitive. The section contemplates cases of habitual offenders and persons so desperate and dangerous as to render their being at large without security hazardous to the community. It is such persons who are likely to have no regard for law and order and the object with which the section has been enacted is just to ensure that such persons will be of good behaviour in future. It is a preventive measure against the further commission of offences by a person whose past record shows that he is in the habit of committing offences. The object of taking the security is the prevention of offences in the future and not the punishment for offences committed in the past. (*In the matter of Umbica Prosad 1 C. L. R. 268 ; In Raja Valad Hussain Saheb 10 Bomb. 174 Peaddu Siva Reddi. In the matter of 3 Mad.*

238 ; Hari Telang 27 Cal. 781 S. C. 4 C. W. N. 531 Rajendro Narayan Sing vs. *Emperor 17 C. W. N. 238 S. C. 16 C. L. J. 467*).

The section is not intended to consign bad characters to jail but to prevent their committing offences and to allay public apprehensions.

Section if intended to secure safety of property alone or also safety of person.

It has been enacted to afford protection to the public against the repetition of crimes in which the safety of property is menaced and not the security of persons jeopardised (*Rajendra Narain Singh* vs. *Emp. 17 C. W. N. 238 S. C. 16 C. L. J. 467 ; Emp.* vs. *Nawab 2 All. 835*).

But it has also been held that the section is not so limited to the former class of cases but applies also to a case where the objects of the accused are primarily directed against the security of person only. (*Monindra Mohan Sanyal* v. *Emperor 23 C. W. N. 193*).

Section not to be applied to coerce landlords.

It was never intended to be applied to coerce landlords however recalcitrant they may be to adopt methods suggested to them for the management of their estates (*Rajendro Narayan Sing* v. *Emp. 17 C. W. N. 238 S. C. 16 C. L. J. 467*).

Where the section should not be applied.

Where there is an apprehension of any one using violence towards a particular person or persons he should be bound down for keeping the peace under Sec. 107 and not for being of good behaviour under Sec. 110 (*Emp.* vs *Kallu, 27 All. 92*).

Proceedings under the section ought not to be instituted with a view to bind down a person on an indefinite charge after prosecutions against him on definite charges for substantive offences have failed (*Alep Pramanikh* v. *Emperor 11 C. W. N 413 ; Kismat Akanda* vs *Emperor, 11 C. W. N. 129*).

Proceedings under the section should not be instituted during the pendency of a prosecution for a substantive offence the commission of which is relied on as a basis for the proceeding for security for good behaviour. (*Umbica Prosad In re 1 C. L. R. 218*).

But it must be borne in mind that the exercise of the power under the section is not limited to such cases only in which positive evidence is available of the commission of crime by the persons against whom it is sought to enforce the law. (*Pedda Siva Reddi, in the matter of 3 Mad. 238*).

A mere proof of bad character does not bring the case under the section (*Karuphanan Servai In re 8 M. L. J. 246*).

The provisions of Sec. 109 and 110 were not intended to be enforced against persons when little more can be proved or alleged than that they belong to a wandering tribe. (*Yeru Rala Manipati Polu Gadu 2 Weir 53*).

Propriety of proceedings against person registered under the Criminal Tribes Act.

Proceedings under section 110 against persons who have been registered under section 4 and the following sections of the Criminal Tribes Act are not illegal (*Sheikh Gulam Rasul* vs. *Emperor 20 Cr. L. J. 30*) although such proceedings are inexpedient. (*Per Huda, J. in Sheikh Gulam Rasul*). The fact that the persons proceeded against are already registered under the Criminal Tribes Act may be a factor and an important factor which the Magistrate should take into consideration before he makes an order against them under Sec. 110. (*Sheikh Gulam Rasul, Per Richardson, J.*). While the control that is required over a person by registering him as a member of a Criminal tribe is sufficient to prevent him from committing many of the acts for which preventive action under Chap. VIII Cr. P. C. may be necessary, he has, notwithstanding such control enough liberty left in him to pursue a career of crime bringing him within some of the clauses (*a*) to (*e*) of Sec. 110 or to prove himself dangerous to society within the meaning of cl. (*b*) of that section. Each case has therefore to be scrutinised on its

merits. If such proceedings appear necessary in view of the exigencies of any particular case evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a Criminal tribe should be if at all acted upon with great caution and scrutiny. The fact that the reputation of the accused continued as before registration did not show that further preventive action was necessary (*Badu Mir* vs. *King Emperor 31 C. W. N. 165*).

Sec. 110 as related to Sec. 109.

Sections 109 and 110 have the same object and an order under Sec. 110 is not valid during the continuance of an order under Sec. 109. (*Gholam Ali* vs. *Emp. 8 C. W. N. 543*). A person cannot be bound over both under Secs. 109 and 110 [*Rangaswami Pillai In re 38 Mad. 555 ; Kosa Kumaran In re 38 Mad. 556 (note)*].

Secs. 110 as related to Sec. 108.

The mere fact that Sec. 108 may have been applicable does not necessarily make Sec. 110 inapplicable (*Monindra Mohan Sanyal* v. *Emp. 46 Cal. 215 S. C. 23 C. W. N. 193*).

Simultaneous order under Sec. 110 and other statutes dealing with prevention of offences.

If a person is required to furnish security for good behaviour it is illegal to make an order at the same time under Sec. 7 of the Punjab Restriction of Habitual Offenders Act restricting his movements (*Kebir Baksh* vs. *Emp. 1 Lah. 100*) or under the Burma Habitual Offenders Restriction Act (*Panzyaw* vs. *Emp. 24 Cr. L. J. 735*).

Necessity of caution in applying Sec. 110.

Extreme caution in administering the Section has been enjoined. [*Meherban Sing* vs. *Emp. 13 A. L. J. 1046, Emperor* vs. *Kalachand Das 6 Cal. 14 ; Doulat Sing In the*

matter of 14A 45.] Proceedings under the Section are often carried on not in the interests of any public affair or in the interests of the public generally but in the interests of private individuals as was the case in *Rai Ishri Pershad* vs. *Emperor 23 Cal. 621* and such an application of the section is a gross misuse of it. As pointed out by Mukherji J. in *Rajendra Narayan Sing* vs. *Emp. 17 C. W. N. 238* the preventive jurisdiction with which the Magistrate is vested is a powerful means to secure the interests of the community from injury at the hands of hardened offenders of the most dangerous classes But this very fact renders it necessary that the power should be exercised with caution and discretion.

As pointed out by Digambar Chatterji J. in *Kali Proshonyo Basu Roy Chowdhury* vs. *Emp. 15 C. W. N. 366* it is notorious that accusations under this Section are constantly made with the object of blackening an enemy's character and of satisfying feelings of spite and hatred and the Magistrate cannot be too cautious in making sure that provisions intended for securing the peace of the community are not utilised for wreaking private vengeance under the aegis of a crown prosecution. As happily put by Spankie J. in *Misrilal 4 N. W. P. R. 117* the good effect of the law embodied in the section is lost if applied too freely and to persons whose cases are not within its provisions.

The powers under the section are to be exercised very sparingly and in only those cases where the evidence is very clear and precise. It was never intended by the legislature to provide a means of punishment by enacting section 110. (*Jagat Sing* vs. *Crown 2 Lah. L. J. 237*).

Notable instances of the misapplication of the section.

The necessity of care and caution in invoking the aid of the section and confining its application to the only legitimate purpose for which the section has been enacted will appear from a few of the well known cases under the section amongst which the following may be referred to as typical instances of the abuse of the section.

(1) Umbica Prossad In the matter of, I. C. L. R. 268.

In *Umbica Prossad In the matter of, I. C. L. R. 268* the petitioner was the son of a rich Zemindar in the District of Shahabad and both father and son were known to be among the Chowgain Baboos a family well known in the district.

One Bisheswar was arrested on a charge of robbery in the beginning of 1876 and on the 16th January 1876 made certain statements to the Magistrate admitting his having been concerned in a dacoity in March 1872 and also in several other dacoities. Six months afterwards this Bisheswar, having been in jail all that time, on the 10th July, made a further statement before the Magistrate and in that he for the first time mentioned the name of the petitioner alleging that on a certain occasion some three or four years previously he had received stolen goods. Upon this statement being made the petitioner was arrested and charged before the Deputy Magistrate with having received stolen goods. At first he was kept in prison, bail being refused, but an application being made to the High Court it was ordered that he should he released on giving suitable bail.

The petitioner was then released on bail on the 12th August but before he could reach his house the police on the 15th August made a report that he was of bad repute and proceedings for security for good behaviour were started and ultimately an order was made for furnishing security of Rs. 20,000 in four sureties of Rs. 5,000 each to be of good behaviour for one year. About the same time that the order for furnishing security was made the petitioner was committed to take his trial in the Court of Session on the charge of receiving stolen goods. This trial ended in an acquittal. The Deputy Magistrate in his order for furnishing security observed that both father and son were known by repute to be notorious Thangidars or receivers of stolen property and to entertain notorious *budmashes* of the worst type, that both father and son were in the habit of sending out *budmashes* to distant parts of the country to commit theft and on their return to receive the stolen property brought by them and

that this disgraceful state of things continued for a very long time. He further found that besides evidence of a general nature to prove that Umbica Prosad had a repute which extended rather widely of being Thangidar there was evidence of a specific nature which proved the disreputable notoriety the family had gained in the district and that it was proved that at one time the father of Umbica Prosad invited dacoits to be avenged on a man whom he bore a grudge. Macpherson and Birch J. J. in condemning the institution of the proceedings and the final order made therein remarked as follows:—"One thing is very clear on the face of the Deputy Magistrate's judgment that if the conduct of the petitioner has been for many years past such as he finds it was it says but lititle for the police of the District that Umbica Prosad has been at large so long and it is to be hoped that before accepting as true all that was said by the policemen who were examined the Deputy Magistrate duly considered the improbability of their having kept quiet all these years had they really known all that they now say they knew.

The order of the Deputy Magistrate is bad and must be quashed, the whole proceeding being an arbitrary and entirely wrong use of the powers entrusted to Magistrates by Chap. XXXVIII of the Code of Criminal Procedure (1872). The object of that chapter is the prevention not the punishment of crime and with that object it authorises Magistrates to take from certain persons good and sufficient security for their good behaviour.

But it is solely for the purpose of securing future good behaviour that Sec. 505 can be used and any attempt to use it for the purpose of punishing for past offences is wrong and not sanctioned by law. * * * * *

When the accused was being actively prosecuted on a substantive charge and he had given bail which the Magistrate deemed sufficient for his appearance when required what possible necessity or justification was there for proceeding simultaneously under Sec. 505? Such a thing never was contemplated by Chap. XXXVIII and in no way falls within the spirit of that Chapter.

The proceedings were wrongly and illegally instituted for the sole purpose of securing at all hazards the punishment of the petitioner or there was an utter and fatal want of discretion in their institution and in the order made."

Ishri Pershad vs. Q. Emp. 23 Cal. 621.

In *Rai Ishri Pershad vs. Q. Empress 23 Cal. 621* a zemindar of Patna of very considerable means, who had always been looked upon by the local officials as a staunch friend to Government interests, a zealous supporter of law and order at whose instance many notorious *budmashes* had been prosecuted and convicted was proceeded against as a habitual offender on evidence that there were rumours in the city of Patna that he had committed acts of extortion on various occasions, that the had *budmashes* in his employ to assist him in that way and generally that he was a man of bad character.

Rai Ishri Pershad was bound down in his own bond for Rs. 25,000/- with two sureties each for Rs. 12,500/- to be of good behaviour for three years.

Petheram C. J. and Beverly J. on an examination of the whole evidence on the record cancelled the bonds and pointed out the difference between rumours and general repute in words which have become famous "Evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact.

Evidence of repute is a totally different thing. *A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen* and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute there is strong evidence that he is a man of that character. On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits that is strong evidence that he is a man of bad character but to say that because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind those rumours are in them-

selves evidence under this section is to say what the law does not justify us in saying."

(3) Kali Proshanyo Basu vs. Emp. 15 C. W. N. 366.

In Kali Proshanyo Basu Roy Chowdhury vs. *The Emperor 15 C. W. N. 366* the petitioner Kali Proshanyo belonged to a respectable family of zemindars in Eastern Bengal, the Basu Chowdhuris of Bohor. The Bohor family was split up by successive partitions and the several branches were at loggerheads. The members of several branches made a common cause against the petitioner Kali Proshanyo and supported the prosecution by their evidence. The petitioner had special enmity with a retired Military Contractor of great wealth, a Rai Bahadur and the police officers generally sided with him.

Kali Proshonyo was a Mukhtar enjoying a good practice and he saw the Superintendent of Police and complained to him that the local police officers had combined with his enemies and were trying to humiliate him in various ways. After this a police report came forward against him and proceedings under section 110 were taken and Kali Proshanyo was ordered to execute a bond for Rs. 5,000/- and furnish five securities in Rs. 100/- each to be of good behaviour for three years. The struggle with the Rai Bahadur over chur lands had been long and bitter and his influence was plainly visible in the case.

Digambar Chatterji and Richardson J. J. in setting aside the order observed "It is clear on the findings of the Magistrate himself that this public prosecution has been supported by persons more or less interested in the downfall and humiliation of the petitioner. *It is notorious that accusations under this section are constantly made with the object of blackening an enemy's character and of satisfying feelings of spite and hatred and the Magistrate cannot be too cautious in making sure that provisions intended for securing the peace of the community are not utilised for wreaking vengeance under the aegis of a crown prosecution.* * * * * Kali Proshanyo generally lives at Munshiganj, has a very large criminal practice there and a very large number of respectable people have deposed to

his good character. If he was habitually of such a bad character as the prosecution wants to make out why was he not prosecuted until he made specific charges of misconduct against the police?"

(4) Rajendro Narayan Sing vs. Emp. 17 C. W. N. 238.

In *Rajendra Narayan Sing* v. *Emp. 17 C. W. N. 238 S. C. 16 C. L. J. 461* the owner of a Zemindary yielding an income of Rs. 25,000/- per year, an Honorary Magistrate of twenty years' standing, a member of an old and respectable family having very respectable connections in the district of Bhagalpur and elsewhere was proceeded against under section 110 on the allegation that he answered to the description of all the classes of criminals enumerated in the six clauses of the section. It appeared that the District authorities were dissatisfied with the management of the estate of the petitioner by himself and believed that he harassed and oppressed his tenantry.

In 1908 steps were taken by the authorities to compel him to resign the post of Honorary Magistrate but as he did not agree to do so he was not invited to sit on the Bench because it was thought most undesirable that in view of the tension between him and his tenants he should continue to hold the office as Honorary Magistrate. About this time an enquiry was set on foot and 200 witnesses were examined with a view to institute proceedings against him under section 110 but the intended proceedings were dropped because the petitioner agreed to appoint a competent European Manager. During the managership of the first European Manager the petitioner was carefully watched and was so absolutely under the control of the authorities that when his house was inundated by the flood of the river Kusi he was not allowed to remove to another place. After the sudden resignation of the first European Manager the petitioner in defiance of the wishes of the authorities appointed a European Manager of his own choice and for this he was peremptorily called upon to submit an explanation. In November, 1911, the petitioner dismissed the European Manager whom he himself had appointed and replaced him by a retired Indian Police official; he thereby contravened what was said

to have been the condition of the dropping of proceedings in 1908 namely the appointment of a competent European Manager. In May, 1912, the police submitted a report against the petitioner and proceedings under section 110 were started. The petitioner moved the High Court for the quashing of the proceedings on the ground that they were not *bona fide* and that they were designed to force him to adopt such mode of management of his properties as might commend itself to the District authorities. The case was heard in the High Court in the first instance by Carnduff and Imam J. J. who differed in opinion and was again heard by Mookerji J. to whom it was referred by the Chief Justice. Mookerji J. in quashing the proceedings observed "One circumstance does seem to me to be remarkable, if the petitioner was in 1908 a man who habitually committed extortion and mischief and protected and harboured thieves, aided in the concealment and disposal of stolen property, committed offences involving a breach of the peace, indulged in petty thefts, received stolen property and was so desperate and dangerous a character that he could not be left at large without serious hazard to the community——if he was a man of this type and proved to be so by 200 witnesses examined by the crown how is it that the District authorities not only dropped the proceedings under section 110 but dealt with him as an estimable gentleman for more than 3 years under the control and guidance of a European Manager? This circumstance in my opinion hopelessly discredits the case for the crown. * * * *The salutary provisions of section 110 were enacted by the legislature for the purpose of protecting society from habitual offenders; they were unquestionably never intended to be applied to coerce landlords however recalcitrant they might be to adopt methods of management of their estate the efficacy of which very indiscreetly perhaps they might not appreciate though pressed upon them with the best of intentions.*

Locus Penitentiæ.

Accused persons should be given a chance of reforming their character and they should not be proceeded against soon

after they have emerged from jail (*Emp.* vs. *Shiekh Abdul 43 Cal. 1128 S. C. 20 C. W. N. 725; Junab Ali* vs. *Emp. 31 Cal. 783 S. C. 8 C. W. N. 909 ; In re Jaswant Sing 6 W. R. Cr. 18 ; In re. Haider Ali 12 Cal. 520*).

In *Juswant Sing In re 6 W. R. Cr. 18* it was pointed out that orders for furnishing security for good behaviour should not be made one after the other without giving the person proceeded against a fair chance of leading a new life.

In *Haider Ali In the matter of 12 Cal. 520* the petitioner had only been released two months from jail after having undergone a sentence of five years' rigorous imprisonment for housebreaking this being his second conviction. He was called upon to furnish security for good behaviour and it was pointed out by McDonell and Beverley J. J. that it was rather the duty of the police to assist him in finding honest employment than to apply to have him incarcerated for a further period merely on the ground of his previous convictions.

In *Emperors* v. *Nawab 2 All. 835* Straight J. observed "The greatest thief is entitled to a locus penitentiæ when he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed that the machinery of the Act should be brought into operation in order to obtain a substantial guarantee for society that he will not commit further depredations upon it."

A bond for good behaviour for three years expired on the 13th June, 1905. On the 20th June, 1905, fresh proceedings were started against the accused under section 110 Cr. P. C. and it was held that the interval was not long enough to give the accused an opportunity of showing that he was willing to adopt an honest livelihood and that evidence relating to events prior to the 13th June, 1905, was inadmissible in support of a fresh order under section 110 (*Emp.* vs. *Ranjit 28 All. 306 3 A. L. J. 2.*) A period of under two months for release from jail is not sufficient time to give an opportunity of showing willingness to adopt an honest livelihood (*Emp.* v. *Ahmad Khan 1905 A. W. N. 34*).

Where a person who was imprisoned for one year under section 110 Cr. P. C. was required again to furnish security for

good behaviour after an expiry of fifteen months from his release from jail it was held that the order was bad the petitioner not having had sufficient locus penitentiæ (*Junab Ali v. Emp. 8 C. W. N. 909 S. C. 31 Cal. 713*).

Security should not be demanded from an accused person trying to reform himself and who has for sometime though short led an honest life on the ground that there was no guarantee that he had mended his ways (*Appaya In Re, 10 M. L. T. 333*). The accused must have time after his release either to retrieve his character or to show cause that he has no intention of doing so (*Po Hmi* v. *Emp. 17 Cr. L. J. 185*).

If however in the emergencies of a particular case fresh proceedings are taken after the expiration of the period of a bond for good behaviour it must be confined to facts and circumstances alleged after release from last security (*Ramdeo Pande* vs. *Emp. 19 C. W. N. 223*).

Fresh proceeding after expiry of one.

Where after the expiration of the period of a bond for good behaviour fresh proceedings are taken against the accused such proceedings must be confined to facts and circumstances alleged against him after release from his last security (*Ram Deo Pande* v. *Emp. 19 C. W. N. 223*).

Where once proceedings have terminated in favour of the persons against whom they were taken and fresh proceedings are taken again on the same information as were available on the first occasion which had been discredited by the Magistrate it is incumbent on the police to prove in the second proceedings that the petitioners had acquired the reputation of being habitual thieves or receivers of stolen property since the passing of orders in the first proceeding (*Lala* v. *Crown 14 Cr. L. J. 603*).

In one case the police report on which the proceeding was drawn up was dated 29th July but by mistake 27th July was put down in the proceeding and the Magistrate recorded an order of discharge under Sec. 119 on the ground that there was no police report in existence on which the proceeding was

drawn up. Another Magistrate drew up another proceeding on the same police report dated 29th July. It was held that as the subsequent proceedings were based on a police report which was not the foundation of the former proceedings they were not invalid (*Chandar Shahu* v. *Bhadai Raj 14 Cr. L. J. 189*).

Where the accused was run in under Sec. 110 and discharged on a finding that the prosecution had entirely broken down and proceedings were started against him once more only seven months afterwards it was held that evidence as to events which happened prior to the previous proceedings was inadmissible (*Shaken* v. *King Emp. 24 Cr. L. J. 566 S. C. 26 Oudh Cases 242*).

CHAPTER XIV.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED.

THE SEVERAL CLAUSES OF SEC 110.

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Clauses (*a*) to (*e*) of Sec. 110 deal with habitual offenders and cl. (*f*) deals with desperate and dangerous characters. Clause (*a*) contemplates habitual robbers, house-breakers, thieves and forgers, the latter having been added by the Amending Act of 1923.

Cl. (*b*) contemplates habitual recoverers of stolen property knowing the same to have been stolen

Cl. (*c*) deals with persons who habitually protect or harbour thieves or aids in the concealment or disposal of stolen property.

Cl. (*d*) deals with persons who habitually commit or attempt to commit or abet the commission of the offence of kidnapping, abduction, extortion, cheating or mischief or any offence punishable under Chap. XII of the Indian Penal Code (offences relating to coin and Government stamps) or Sec 489-A (counterfeiting currency notes or bank notes) or Sec 489-B (using as genuine forged or counterfeit currency notes or bank notes) or Sec. 489-C (possession of forged or counterfeit currency notes or bank notes) or 489-D (making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes.

This clause has been substituted for the old which was in the following terms "habitually commits mischief, extortion or

cheating or counterfeiting coin currency notes or stamps or attempts so to do."

Cl. (*f*) contemplates persons who are so desperate and dangerous as to render their being at large without security hazardous to the community.

This is the most dangerous of the provisions contained in Sec. 110 on the one hand and the most formidable and effective weapon in the hands of the police on the other to deal with the most dangerous enemies of law and order who break the law and yet cannot be visited with punishment in the ordinary way.

Habitual offenders.

A previous conviction alone not sufficient to prove habit.

It is only habitual offenders who are contemplated as being within the scope of the section. To be by habit an offender is a totally different thing from being found to have committed an offence on a particular occasion. As pointed out in *Haider Ali, In the matter of 12 Cal. 520* the mere fact that the person from whom the security was demanded had been previously convicted of offences against property is not in itself sufficient to justify proceedings under Sec. 110 unless there is additional evidence that the person complained against has done some act or resumed avocations that indicate on his part an intention to return to his former course of life and pursue a career of preying upon the community.

Impropriety of proceeding in lieu of prosecution for substantive offence.

Under the Indian Penal Code belonging to a gang of persons associated for the purpose of habitually committing dacoity and belonging to a wandering gang of persons associated for the purpose of habitually committing thefts are specific offences under Secs. 400 and 401 respectively and where the allegation amounts to a charge under either of these sections a proceeding for security for good behaviour should not be instituted but there should be a prosecution for the specific offence and a regular trial.

As pointed out by Mukherji J. of the Allahabad High Court

in *Ram Proshad* v. *Emp. 23 A. L. J. 18* a man may by habit be a robber and so long as he is not charged with a definite act of robbery he may be bound over under the preventive sections. But as soon as it is said that he along with four or more others habitually commits robbery the man becomes at once a member of the gang of dacoits and thereby commits a definite and specific offence under Sec. 400 I. P. C. Sec. 110 Cr. P. C. deliberately omits dacoity out of its purview. It is not for the courts to find out the motive for the omission but if it were necessary one could easily be found. Being a member of a gang of dacoits is a definite offence defined and punishable under the Indian Penal Code and it is for that reason that under the preventive section action could not be taken for having committed a specific offence.

But this view has not been accepted by Boys and Banerji J. J. in the same court who held that it is impossible to accept the proposition that evidence going to show that a substantive offence had been committed or in other words evidence which might possibly form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under Sec. 110 Cr. P. C. and cannot form the basis of an order under Sec. 112 and a finding under Sec. 118 (*Budhan* v. *Emperor 47 All. 733*).

Evidence necessary to prove habit.

To prove that a person is a habitual offender or that he comes under cl. (*f*) there should be proof of specific acts showing that he to the knowledge of some particular individual is a dangerous or desperate character (*Kalai Haldar 29 Cal. 779*).

A vague and general statement that a man is a habitual offender is not sufficient evidence on which an accused person is liable to be bound down under Sec. 110. The evidence must be of persons who are speaking to matters within their personal knowledge and not mere hearsay (*Rup Sing* v. *King Emp. 1 A. L. J. 616*) in other words the evidence must be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the accused is a habitual offender. (*Gholam Ali 8 C. W. N. 543*).

Mere statements of witnesses that they suspect that a

person is a thief or dacoit are not sufficient to indicate that there was sufficient reason for the suspicions (*Alep Pramanik 11 C. W. N. 413 ; Sitrendra Nath Manna* v. *Emp. 21 C. L. J. 170*).

Mere allegation by the police that the person proceeded against was suspected in several cases when there was no complaint of such offence to the police or to the Magistrate is not sufficient to warrant an order under Sec. 110 (*Emp.* v. *Ahmad Khan 1905 A. W. N. 34*).

Rumours.

Proceedings under Sec. 110 are to be taken with great care and caution. They are not intended to enable the police to have a person sent to jail where it cannot find sufficient evidence to prosecute him for any specific offence. Where the evidence against the accused consisted mostly of rumours of his being suspected as receiver of stolen property and it had not been shown that he was ever convicted of theft or even tried for such an offence or that any stolen property was ever recovered from his house he could not be held to be a habitual offender and receiver of stolen property (*Harnman Das* v. *Emp. 22 Cr. L. J. 269*).

Suspicion.

The powers under the section are to be exercised only where the evidence is very clear and precise. Where beyond mere suspicion that accused are habitual thieves nothing substantial has been established action under the section is not justified. The fact that sixteen years ago one of the accused had on three occasions been bound over is no ground for considering that he had not reformed himself and will not justify action against him (*Jagat Sing* v. *Emp. 23 Cr. L. J. 507*).

But it has also been held that it is not necessary for the purpose of the section that specified instances should be given (*Emp.* v. *Shakuha 9 Bomb. L. R. 164 ; Mithukhan In the matter of, 27 A. 172 S C. 2 A. L. J. 685 S. C. 1904 A. W. N. 206*).

Evidence of acts of misconduct committed long ago.

In an enquiry whether the defendant is a habitual offender evidence of acts of misconduct committed by him years ago is admissible in evidence as indicating the formation of the habit but such evidence unless supplemented by evidence of misconduct com-

mitted by the defendant within a year or so before the institution of the proceeding cannot justify an order (*Wahed Ali Khan 11 C. W. N. 789*).

Where the question is whether a person is a habitual cheat the fact that he belonged to an organisation formed for the purpose of habitually cheating in concert is relevant under Sec. 11 of the Evidence Act and it is open to the prosecution to prove against each person that the members of the gang do cheat (*Kalu Mirza 37 Cal. 91*).

The mere association with men of bad characters is not sufficient unless the association is to commit theft or dacoity (*Nil Kamal Das* v. *Emp. 6 C. L. J. 711*) and therefore the facts that a landlord has tenants of bad character, that he lends money or paddy when the latter are in difficulty and because they are his tenants and that he settles disputes between two men one of whom is a thief and the other is not do not subject him to a proceeding under Sec. 110 (*Nil Kamal Das* v. *Emp. 6 C. L. J. 711*).

Habitually bringing false civil cases.

The section does not apply to a person who has the reputation of habitually bringing false claims in civil cases. In proceedings against such a a person although evidence of general repute is admissible it cannot be allowed to override the findings arrived at by the Civil Courts after trial (*Bapaji* v. *Emp. 19 Cr. L. J. 885*).

Obtaining decrees by forged documents.

The obtaining of decrees by forged documents being neither cheating nor extortion such habitual offender is not liable under the section (*Emp.* v. *Chuni 21 P. R. Cr. 1924 S. C. 16 Cr. L. J. 136*).

Inference of criminal habit from conduct.

In one case where the only evidence against the accused was that he was found hiding himself in a bush and when his person was searched certain articles not claimed by him to be his own were found there was no presumption that he was there with a view to commit an offence so that he might be deemed to be a habitual offender within the meaning of Sec. 110 (*Muvia Nagadu In re. 10 M. W. N. 355 S. C. 12 Cr. L. J. 359*).

Where however it was found that the accused persons who associated for the purpose of spreading disloyal doctrines among school boys and students besides being engaged in preparing the young for the future revolution were connected with an organisation for the collection of money by dacoity it was held that the acts were sufficient to bring the case within cl. (1) of Sec. 110 (*Monindro Mohan Sanyal* v. *Emp.* 23 *C. W. N.* 193).

"Habitually" interpreted as "persistently or repeatedly."

In *Local Government* v. *Nanmant Rao* 25 *Cr. L. J.* 60 the word "Habitually" has been interpreted as "persistently or repeatedly". It was held that the word habit should not be restricted to mean "inclination by nature" and it would be difficult to prove habit in that case. Where the accused repeatedly and persistently committed acts of extortion consisting in the compelling of merchants to sign agreements not to import foreign cloth by resort to picketting and in the levy of fines in the case of merchants who traded in such cloth, in carrying out a particular political programme it was held that the conduct of the accused brought him within the scope of cl. (*d*) of Sec. 110.

Habitual commission of offences involving a breach of the peace: cl. (*e*).

Offences involving a breach of the peace mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace (*Arun Samanta* v. *Emp.* 30 *Cal.* 336 ; *Kali Proshonyo Basu* v. *Emp.* 15 *C. W. N.* 366).

It is only the habitual commission of such offences that attracts the operation of cl. (*e*) (*Kali Proshonyo Basu* v. *Emp.* 15 *C. W. N.* 366).

Immoral and indecent acts are not such offences (*Arun Shamanto* v. *Emp.* 30 *Cal.* 336).

Where the evidence against a person shows no more than that he was making indecent overtures to boys passing by his shop and abusing people he cannot be proceeded with under

Sec. 110 Cr. P. C. (*Mahammad Ashgar Khan* v. *Emp. 16 Cr. L. J. 582*).

Where under the orders and with the connivance of the Zemindar various acts of oppression are committed such conduct of the Zemindar would bring him within cl. (*e*) (*Kashi Sunder Roy 31 Cal. 419*). Where it was found that the Naib of the co-sharer Zemindars who were brothers had led several riots in their interest and had been convicted in several cases and that certain *lathials* were always employed to help their cause it was held that one of them who was a Mukhtar practising and residing elsewhere and who was not shown to have been implicated in the acts should not have been bound over but the other who resided at the place and whose complicity was established by the evidence was rightly bound over (*Kali Proshonyo Basu* v. *King Emp. 15 C. W. N. 366*).

Desperate and dangerous persons. cl. (*f*)

A desperate and dangerous person within the meaning of cl. (*f*) of Sec. 110 is one who has a reckless disregard for the safety of the person or the property of his neighbours (*Wahed Ali Khan* v. *Emperor 11 C. W. N. 789*).

The mere fact that a man promotes litigation does not make him a dangerous or desperate character within the meaning of the section (*Oswari Dutt* v. *Emp. 16 A. L. J. 776 ; Keshab* v. *Emp. 4 Oudh L. J. 143*).

Where the imputations were that the petitioners had for sometime past made themselves very objectionable in the neighbourhood and that they had been annoying the villagers in various ways by kicking at their doors at night or throwing brickbats on the roof and annoying respectable women it was held by Prinsep and Handley J. (*Akhoy Kumar Chatterji* v. *Q. Emp. 5 C. W. N. 249*) that these imputations if proved did not constitute conduct such as to render the petitioners liable to give security for good behaviour by reason of their being at large without security hazardous to the community.

[*N.B.*—It must be observed that these cases cannot be taken to be laying down any general proposition of law. These are

decisions in which on the facts and circumstances before the Court Sec. 110 was held to be inapplicable. It goes without saying that there may be cases in which the conduct imputed to the accused may be similar to that which was made the basis of proceedings in the decisions referred to above and yet the circumstances may be such as to present before the Court a typical case for the application of Sec. 110.]

Evidence of general repute

In cases coming under clause (*f*) evidence of general repute was not formerly admissible but now under clause 4 of Sec. 117 such evidence is admissible in these cases as much as in cases coming under the other clauses of Sec. 110.

Amir Ali and Pratt J. J. in *Kalai Haldar* v. *Emp.* 29 *Cal.* 779 pointed out that the accused should be proved to be a desperate and dangerous character by evidence of persons who of their own personal knowledge can speak to specific acts by him showing him to be of such character. The evidence of persons however respectable who have no personal knowledge of the accused ought not to be admitted to prove his character.

Where the evidence against certain persons who were called upon to furnish security for good behaviour consisted mainly of the fact that they were Mewatis of a particular place and that the Mewatis of that place were looked upon generally and collectively by the other inhabitants of their neighbourhood as bad characters and dangerous persons it was held that such evidence was not enough to support an order under Sec. 118 in the absence of specific evidence against each of the accused individually (*Emp.* v. *Harmat Khan* 2 *A. L. J.* 174 *S. C.* 1905 *A. W. N.* 31).

Evidence of acts of extortion committed by a person unless these acts were accompanied by acts causing danger to the persons and properties of other persons is not sufficient to bring the case within cl. (*f*) (*Wahid Ali Khan* 11 *C. W. N.* 789).

CHAPTER XV.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS, CONTINUED—

Jurisdiction of Magistrates: Initiation of Proceedings: Arrest and detention in custody of person proceeded against.

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Jurisdiction of Magistrates.

Only the Magistrates mentioned in the section can take action. Under Sec. 530 cl. (*d*) if a Magistrate not empowered

by law in this behalf demands security for good behaviour his proceedings shall be void.

The Magistrate may or may not take action in his discretion. It is not that he shall take action as under Sec. 145 but under Sec. 110 he *may* take action on receipt of the necessary information. He is to exercise his discretion and decide whether or not to take action and he is to take action if in his opinion there are sufficient grounds for proceeding although the section does not say so in so many words as in Sec. 107, 108 but simply says that the Magistrate may take action.

Where a Magistrate who when he commenced the investigation of a case under Sec. 110 was a Sub-Divisional Magistrate but at the date when he made the order under the section had ceased to be so it was held that the order was invalid and made without jurisdiction. (*Muhammed Hassain vs. Emp. 30 Punj L. R. 1913 S. C. 17 Cr. L. J. 142*).

Within the local limits of his jurisdiction—residence if necessary.

It was held by Prinsep and Stanley J. J. that a Magistrate had no jurisdiction to require security for good behaviour under Sec. 110 from persons who did not reside within the local limits of his jurisdiction but who it was alleged habitually committed theft, robbery and house-breaking within such limits. (*Ketabdi* v. *Empress 27 Cal. 993 S. C. 5 C. W. N. 39*) *but this view* has not been accepted in other cases and it has been held that the person proceeded against must be "within the local limits" of the Magistrate's jurisdiction.

The words "within the local limits of his jurisdiction" are not equivalent to residing within the local limits. It is sufficient to give the Magistrate jurisdiction if the evil habits of the accused were practised and evil reputation acquired within the local limits of his jurisdiction (*Emp.* v. *Durga Halwai 43 Cal. 153 S. C. 19 C. W. N. 1022; Emp.* v. *Menna 39 All. 139 S. C. 14 A. L. J. 1074; Koranangan Inre 36 Mad. 96 S. C. 23 M. L. J. 35 ; Bhola* v. *Emp. 20 A. L. J. 49 S. C. 23 Cr. L. J. 86*).

A person who has a residential house and frequently resides for the purpose of his business within the local limits of the Magistrate's jurisdiction can be proceeded against provided the acts charged are committed while he resides. (*Kashi Sundar Roy* v. *Emp. 31 Cal. 419*).

According to Richardson and Huda J. J. even the limitation about the accused practising his evil habits and acquiring an evil reputation within the local limits of the Magistrate's jurisdiction is not necessary and it is sufficient for the exercise of the Magistrate's jurisdiction that the person should be within those limits at the time when proceedings are taken (*Lakhi Narayan Das* v. *Emp. 23 C. W. N. 100 S. C. 30 C. L. J. 173*).

As observed by Batty and Pratt J. J. the legislature has advisedly adopted the expression "any person within the local limits of his jurisdiction" to exclude the necessity of proving anything approaching permanent residence and to leave it in the power of the Magistrate to deal with what are perhaps the most dangerous habitual criminals who wander from place to place and have no well-known residence where the police or the Magistrate could be sure at any time of finding them. (*Emp.* v. *Bapoo Yellappa 9 Bom. L. R. 244*).

The Burma Chief Court went so far as to hold that the section could be applied to a person undergoing a sentence of imprisonment in a jail within the local limits of the Magistrate's jurisdiction (*Emp.* v. *Nga Sing 9 Bur L. T. 39 S. C. 17 Cr. L. J. 88*). This is undoubtedly going too far.

Mr. Justice Prinsep whose opinion is entitled to the greatest respect seems to have all along stuck to the view taken in Ketabdi's case, as the following note in the fourteenth edition of his commentary on the Code of Criminal Procedure will show—"To give a Magistrate Jurisdiction to take proceedings under Sec. 110 the person informed against must be within the local limits of his jurisdiction, that is residing within such limits. The fact that at the time that proceedings are instituted he may be in detention in a District would not give jurisdiction. Residence implies something voluntary."

It is not contemplated that the Magistrate should issue a warrant so as to pursue him into another jurisdiction (*Ketabdi*

v. *Empress 27 Cal. 993 S. C. 5 C. W. N. 29) but a person* residing within the local limits of a Magistrate's jurisdiction can be proceeded against by such Magistrate although he was arrested in another jurisdiction in connection with another proceeding under Sec. 55 (1) (c) of the Code (*Emp.* v. *Nga Po Aung 10 Bur L. T. 44 S. C. 17 Cr. L. J. 319*).

It has been pointed out by Pargiter and Woodroffe J. J. that the enquiry should not be conducted by a Magistrate at a place which is outside the local limits of his jurisdiction and where he has no power to conduct any proceedings. The person against whom proceedings are taken under Sec. 110 must be at the time where such proceedings are taken within the local limits of the jurisdiction of the Magistrate taking such proceedings. (*King Emp.* v. *Sonaram Sangma 3 C. L. J. 195*).

In this connection the provisions of Sec. 531 of the Code should not be overlooked. That section provides that no finding sentence or order of any criminal court shall be set aside merely on the ground that the enquiry trial or other proceeding in the course of which it was arrived at or passed took place in a wrong Sessions Division District, Sub-Division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Effect of transfer as to jurisdiction.

On transfer a Magistrate acquires jurisdiction to try the case in spite of the fact that the person proceeded against is not within the local limits of his jurisdiction but the proceeding must be properly initiated and the transfer properly made

Where a District Magistrate to whom information was given by the police that certain persons within the limits of his jurisdiction habitually harboured thieves and aided in the concealment and disposal of stolen property did not issue notice to those persons to show cause why they should not be ordered to give security for good behaviour but merely passed it on to the headquarters Deputy Magistrate who had no jurisdiction over the place where the persons informed against resided and the Deputy Magistrate thereupon drew up proceedings

against them it was held that the District Magistrate could not be said to have initiated proceedings and then transferred the case to the other Magistrate for disposal, that the Sub-Divisional Magistrate had no jurisdiction to issue the notice and try the case and that the proceedings were void. (*Kripa Shindu Naik* v. *Emp. 1918 M. W. N. 751 S. C. 19 Cr. L. J. 905*).

Disqualification of Magistrates.

The provisions of Sec. 190 cl. (*c*) and Sec. 191 do not apply to proceedings under the section (*In the matter of the petition of Mether Khan 27 All. 172*). But the principle of Sec. 190 cl. (*c*) applies (*Godhan Ahir* v. *Emp. 4 Pat. L. J. 7*) and therefore when a Magistrate has framed a proceeding under Sec. 110 against a party and has proceeded in some measure on his own knowledge of the character of the party such Magistrate is not a proper person to proceed with the trial. (*Alimuddin Haldar 29 Cal. 392 S. C. 6 C. W. N. 595*).

Under Sec. 556 no Magistrate shall, except with the permission of the court to which an appeal lies from his court, try any case to or in which he is a party or personally interested.

Initiation of proceedings—information on which action may be taken.

The issuing of a notice under Sec. 112 is the initiation of the proceedings under Sec. 110. Magistrates are left a very wide discretion as to the kind of information upon which they may act and they are not bound to disclose it. (*Emp.* v. *Bappo Yellappa 9 Bomb. L. R. 244*).

Source of information.

The Magistrate may initiate proceedings on information derived from any source and he is not bound to reveal the source of his information and it is sufficient if he states the substance thereof. (*Rajendra Narayan Singh* v. *Emp. 17 C. W. N. 238 S. C. 16 C. L. J. 467*).

The law in no way limits the method in which the Magistrate is to receive the information on which he can take proceedings. (*Hiranondo Ojha* v. *King Emp. 1 Pat. 621*).

But the information must be of such a nature as to bring the person informed against within one or other of the clauses of the section. It must be made clear as to which sub-section the accused is charged with coming under. It is not enough merely to assert that he is a person of criminal tendencies or that he is suspected of having committed certain crimes. (*Sohan Sing* v. *Emp. A. I. R. 1926 Lahore 45*).

Nature of information.

Under the Code of 1882 in which Sec. 110 dealt with habitual offenders only it was held in *Raja Valad Hassain Saheb 10 Bomb. 174* that the section contemplated some information showing the habitual bad character of the person informed against.

A Magistrate is not competent upon information that suggests the likelihood of a breach of the peace to resort to Sec. 110. (*Emp.* v. *Babua 6 All. 132*).

In the same case Straight J. pointed out that conversations out of court with persons however respectable are not legal or proper material upon which to adopt proceedings under Sec. 107 or 110 Cr. P.C. His Lordship went on to observe "While in every way anxious to support the Magistrates in preserving peace and good behaviour in the cities under their charge it is impossible that this court can for a moment allow the idea to get current that this is the kind of information required by law to justify issue of the process mentioned in Chap. VIII of the Code. Nor can it permit the judge's extraordinary remark to the effect that he had taken the opportunity of consulting a few of the residents of Mirzapur about the petitioner and the account they gave of him was very black indeed to pass without pointing out in very distinct terms that his action in talking out of court about a case that was before him judicially was most improper and must not be repeated. It seems to be thought that the procedure to be followed for taking securities of the peace or for good behaviour may be of the loosest kind and it is time that this idea was corrected." The use of extra-judicial information very properly condemned by Straight J. in the observations quoted above has been considered by Walsh

Extra judicial information if may be acted upon.

J. in the Allahabad High Court in a recent case. (*Emp.* v. *Darbari Sing 45 All. 749*) and with all deference to the learned judge it must be said that his observations are opposed to the cardinal principles of our system of jurisprudence which govern all criminal trials. It has been held that the information obtained by the trying Magistrate by private enquiries cannot be used as substantive evidence against the accused in proceedings for security for good behaviour but the knowledge so obtained is a form of check which he may legitimately use in order to test the nature of the evidence with which he has to deal and to negative for example a suggestion that the police investigation has been unfair. That is to say a finding that inquiries about the accused "satisfy me that he is a budmash" would be objectionable but a finding that "the result of my enquiries in the neighbourhood so far as they appear in the case of the accused tried to show that the case against him has not been got up without reason" would be quite legitimate. The court of the judicial Commissioner of Oudh has also expressed practically the same view in a case where it holds that when the Magistrate on the evidence comes to the conclusion that the accused are habitual thieves and says that camping on the spot he received information which confirms his impression the course though irregular is not sufficient ground for setting aside the whole proceedings. (*Ram Pargat v. Emp. 12 Oudh L. J. 341 S. C. 26 Cr. L. J. 1149*).

The dictum laid down above is wholly opposed to Sec. 556 under which the Magistrate in the circumstances contemplated above would be personally interested in the case and so be disqualified to try it.

Even the use of a police diary as a source of information on which to draw up a proceeding has been condemned. (*Jhandu Sing* v. *Emp. 25 Cr. L. J. 45*).

The same learned judge who decided the case of Darbari Sing has in another case held that where a Magistrate has been influenced in his judicial order for security for good behaviour against certain persons on private and confidential enquiries made by him the order is vitiated thereby and must be set aside. (*Ashiq Ali* v. *Emp. 21 A. L. J. 513*).

An order made on the personal knowledge of the Magistrate has also been condemned in *Wali Mahommad Khan* v. *Emp. 25 Cr. L. J. 808.*

Remand pending investigation.

Such a person cannot be detained by the police for more than twenty-four hours. Inspite of the amendment of Sec. 167 altering "any investigation under this chapter" to "the investigation" no order of remand is possible under Sec. 167 as the latter part thereof which refers to diaries kept under Sec. 172 shows. An order for adjournment may be made by the Magistrate who may also remand the accused if in custody, under Sec. 344.

Notice to person proceeded against.

The recording of an order under Sec. 112 is absolutely necessary and the enquiry must be held in the manner prescribed. A Magistrate cannot for example make an order for furnishing security in a judgment in which he convicts the accused for some offence mentioned in section 110 (*Partab 1 All. 666; Tamiz 9 Cal. 215*).

In the order recorded the Magistrate is bound to set out the substance of the information received, the amount of the bond to be executed, the time for which it is to be in force and the number, character and class of sureties required. (Sec. 112).

If the person in respect of whom such order is made is present in court it shall be read over to him or if he so desires the substance thereof shall be explained to him. (Sec. 113).

If a summons or a warrant is issued under Sec. 114 it shall be accompanied by a copy of the order which shall be delivered along with the summons or warrant. (Sec. 115).

The order under Sec. 112 is the notice to the accused as to the case against him and is the substitute for an indictment in an ordinary trial.

What notice should contain.

The importance of the notice under the section should never be overlooked and in it the Magistrate should state the substance of the information on which he acts (*Rajendro Narayan Sing 17 C. W. N. 238 S. C. 16 C. L. J. 467; Raj Banshi* v. *Emp. 42 All. 646 S. C. 18 A. L. J. 623; Kotha Middi Ranga Reddi 43 Mad. 450*) the existence of such an information as the Magistrate has reason to believe being the condition precedent to the Magistrate taking action. (*Emp.* v. *Rameshwar 36A 262*).

Where two or more persons have been associated in the matter under enquiry they may be dealt with in the same or separate enquiries as the Magistrate thinks fit. The association which will give the Magistrate jurisdiction to deal in one proceeding with two or more persons must be alleged or implied in the initiatory order. (*Srikanto Nath Saha* v. *Emp. 1 C. L. J. 616 per Geidt. J.*)

The issue of a preliminary notice under Sec. 112 is not a formal matter; it is a judicial act to be exercised after due consideration of the materials placed before the Magistrate.

The notice must contain sufficient details regarding the charge brought against the persons proceeded against. The object of the notice being to enable the accused to prepare for his defence and to summon witnesses on his side before the actual trial commences the defects in the notice could not in any way be remedied by explanations given by the prosecuting inspector at the commencement of the trial. (Kutti Goundan *Inre 47 M. L. J. 689*). *See also Sultan Khan* v. *Emp. 26 Cr. L. J. 767.*

The notice issued under Sec. 110 should sufficiently indicate the time and place of the facts charged and should give sufficient details. It should not merely reproduce the clauses of the section. (*Kripa Sindhu Naik* v. *Emp. 1918 M. W. N. 751*)

It must be made clear to the person proceeded against which sub-section he is charged with coming under. Mere assertion that he is a man of criminal tendencies or suspected of having committed crimes is not sufficient. The omission to

do so vitiates the proceedings. (*Sohan Sing* v. *Emp. 26 Cr. L. J. 1377*).

Merely informing an accused person that he was suspected to be a habitual thief is not a sufficient notice under Sec. 112 of the Code. There must be something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate. (*Raj Banshi* v. *Emp. 42 All. 646 S. C. 18 A. L. J. 673*).

Where the preliminary order passed under Sec. 112 does not clearly set out the substance of the information received by the Magistrate which led to the taking of action the proceedings cannot be regarded as legal. (*Kotha Ranga Reddi* v. *Emp. 43 Mad. 450 S. C. 1920 M. W. N. 398*).

The mere reproduction of the contents of the section without setting forth the substance of the information against the accused is not sufficient and renders the proceedings illegal. (*Kotha Ranga Reddi Inre 43 Mad. 450 S. C. 38 M. L. J. 97 S. C. 1920 M. W. N. 398*).

It is not necessary however to give a list of witnesses in support of the proceeding.

(*Chintanon Sing* v. *Emp. 35 Cal. 243 S. C. 12 C. W. N. 299 S. C. 7 C. L. J. 77; Rajendro Narayan Sing* v. *Emp. 17 C. W. N. 238 S. C. 16 C. L. J. 467; Kripa Sindhu Naikh* v. *Emp. 1918 M. W. N. 751*).

The Patna High Court has held that if in the notice issued to an accused person under Sec. 110 it was not possible to give detailed information as to the nature of the evidence for the prosecution the omission to do so is not an irregularity sufficient to vitiate the proceedings especially if the accused had cross-examined at great length the witnesses for the prosecution. (*Dehra Ahir 20 Cr. L. J. 436*).

The issue of a notice is not a mere formal matter but is a judicial act to be exercised after a due consideration of the materials placed before the Magistrate. (*Kripa Sindhu Naik* v. *Emp. 1918 M. W. N. 751 S. C. 19 Cr. L. J. 905*).

Final order to conform to notice.

The final order under Sec. 118 must correspond with the notice issued under Sec. 112. The Magistrate cannot in the final order impose conditions as to the nature of the security required which were not in the notice (*Emp.* v. *Jangi Sing 1906 A. W. N. 276 ; Belagal Raja Chalu* v. *Emp. 26 M. 471*) or to demand a bond for good behaviour whereas in the notice a bond for keeping the peace was mentioned. (*Driver 25 Cal. 798*). Such a course is forbidden by proviso 1 Sec. 118 ; "No person shall be ordered to give security of a nature different from or of an amount larger than or for a period longer than that specified in the order made under Sec. 112".

Service of notice

Where on a police report that several persons should be bound over for good behaviour the Magistrate instead of sifting the case against each accused and proceeding under Sec. 112 issued nonbailable warrants wholesale under Sec. 114 and they were not accompanied by copies of the order under Sec. 112 the whole proceedings were held to be illegal. (*Abdul Rahaman Sahib 2 Weir 55*). In *Subba Noicken In re 17 M. L.J. 438* ommission to issue a copy of the order under Sec. 112 along with the summons issued under Sec. 114 was held to be fatal. The section 112 has been rather loosely interpreted in *Deputy Legal Remembrance* v. *Kader Mirza 17 C. W. N. 331* where it has been laid down that the enquiry is not strictly limited to the precise terms of the order under the section and the final order can be made in spite of this divergence between the scope of the enquiry and the notice, provided the accused is not misled or prejudiced. In *Kotta Ranga Reddi 43 Mad. 450 S. C. 38 M. L. J. 97* it has been held that where the defect in the preliminary order is not setting forth the substance of the information did not prejudice the accused in the trial and he let in all his evidence the proceedings need not be quashed and in *Emp.* v. *Soleman II Bomb. L. R. 740* it has been held that the omission of a Magistrate to send a copy of the order under Sec. 112 with the summons issued under 114 does not invalidate the trial. It is an irregularity cured by Sec. 537 of the Code.

In *Rameshwar Dosadh* v. *Emp. 1 Pat. L. T. 32 S. C. 21*

Cr. L. J. 321 a copy of the order made under Sec. 112 did not accompany the warrant as required by Sec. 115 but the order was read over to the person affected thereby and there was nothing to show that there was any prejudice. It was held that the omission to attach a copy of the order to the warrant was a mere irregularity not fatal to the trial.

Order beyond the scope of Sec. 112.

An instance of a peculiarly bad order recorded under Sec. 112 is to be found in *Bibi Kulsum* v. *Umatul Mehedi II C. W. N. 121* in which the Magistrate allowed bail to the petitioners on condition of their undertaking that no attempt would be made by them or their agents to realise rent by force and nothing would be done to induce a breach of the peace. It was held that the condition could not be imposed and should be struck out of the bail bond.

Arrest under Sec. 114.

The police cannot arrest without warrant a person against whom security proceedings are taken (*Kala* v. *Emp. 26 Cr. L. J. 1360*). A Magistrate will not be justified in making an order for immediate arrest under Sec. 114 unless firstly he is of opinion that the only way of preventing a breach of the peace is to commit the person to custody and secondly he puts on record the substance of the police report or other information by which he is influenced. (*Maniruddin* v. *Emp. 24 Cr. L. J. 829*).

Sec. 114 is not limited to arrest within the local limits of the Magistrate's jurisdiction and applies to an accused arrested outside the jurisdiction but brought in custody within the jurisdiction for the purposes of the proceedings under Sec. 110. (*Monindro Mohan Sanyal* v. *Emp 23 C. W. N. 193*).

In *Ramjibhai Waghbhai Inre 14 Bomb. L. R. 889* the Magistrate issued a warrant to arrest the accused who had already left his jurisdiction and as the warrant was not executed he took proceedings under Sec. 87 and attached the movable and immovable properties of the accused under Sec. 88 of the Code. It was held that as the accused was no longer living

within the limits of the court's jurisdiction the warrant proclamation and attachment issued against him were illegal.

Bond for appearance may be taken.

Under Sec. 91 of the Code when any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant is present in such court such officer may require such person to execute a bond with or without sureties for his appearance in such court. This authorises a Magistrate to take a bond for appearance from a person who is present in court as contemplated in Sec. 113 or is brought before the Magistrate under Sec. 114.

Where A was placed before a Magistrate by the police and was called upon to furnish security under Sec. 110 and the Magistrate postponed the hearing of the case but bound him to appear at the next hearing it was held that whether A was brought legally or illegally and whether he was under arrest or not the Magistrate was right in treating him as a person present in Court and the order for bail was correct. (*Emp.* v. *Gulam 12 Cr. L. J.* 533).

Detention in Custody.

There is no power given to a Magistrate to detain in custody a person proceeded against for the purpose of taking security from him either for keeping the peace or for being of good behaviour except under circumstances contemplated by Cl. (3) of Sec. 117 where the *ad interim* bond is not furnished. Under the proviso to Sec. 114 whenever it appears to the Magistrate upon the report of a police officer or upon other information that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person the Magistrate may at any time issue a warrant for his arrest. The Magistrate may in his discretion which he has under Sec. 76 of the Code direct by endorsement on the warrant that if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and there-

after until otherwise directed by the Court the officer to whom the warrant is directed shall release such person from custody. The endorsement shall state the number of sureties, the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound and the time at which he is to attend before the Court. It is merely optional with the Magistrate whether or not to make the warrant bailable and if it is not made bailable the person arrested is to be kept in custody which is in law the custody of the Court.

But as soon as a person so arrested is brought before the court and is prepared to give bail he shall under Sec. 496 be released on bail, provided the Magistrate may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance. The person arrested may be detained in custody only if the contingency contemplated by Cl. 3 of Sec. 117 arises that is the Magistrate thinks it proper to call for *ad interim* security and this is not furnished. Save and except under the provision of Sec. 117, Cl. (3) a person proceeded against under Sec. 110 cannot be detained in custody. This is abundantly clear from the proviso to Sec. 496 added by the amending Act of 1923 whereby the obligation to grant bail to all persons other than persons accused of a non-bailable offence has been removed from cases contemplated by sub-section 4 of section 107 and sub-section 3 of section 117 which are the only exceptions to the granting of bail to a person who is not accused of a non-bailable offence.

Prior to 1923 when the provision in sub-section 3, section 117 was not in the Code there was absolutely no provision for the detention in custody of a person perceeded against under Sec. 110 who could be prepared to give bail. Under Cl. 3 of Sec. 117 which has been inserted in the Code for the first time by the amending Act of 1923 the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety may direct the person proceeded against to execute a bond with or without sureties for keeping the peace or maintaining good behaviour until the completion of the enquiry and may detain him in

custody until such bond is executed or in default of execution until the inquiry is completed.

Except under the aforesaid circumstances the Magistrate has no power to detain a person proceeded against, under the security sections in custody (*See Wahari Mandal* v. *Emp. 21 Cr. I. J. 825*). It has been held that such detention is an illegality which vitiates the trial (*Emp.* v. *Bhan Saval Ram 16 Bomb. L. R. 943*). The rulings of the Allahabad High Court in *Rajbanshi* v. *Emp. 42 All. 646 S. C. 18 A. L. J. 6 and Emp.* v *Paimal 10 A. L. J. 531* as also in other cases in which it is pointed out that a Magistrate should not detain a person under Sec. 110 unless he has the information on which he can make the order required by Sec. 112 are unintelligible. They presuppose the competency of the Magistrate to order detention generally in all cases under Sec. 110 for which there is no justification.

Proclamation and Attachment.

If the Magistrate has reason to believe that a person against whom the warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed such court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation (Sec. 87 Cl. 1).

The proclamation shall be published in the manner laid down in Cl. (2) of sec. 87.

The Magistrate issuing a proclamation under Sec. 87 may at any time order the attachment of any property movable or immovable or both belonging to the proclamed person (Cl. 1 Sec. 88).

The manner in which the attachment is to be made and the property attached disposed of and objections to the attachment by persons other than the proclaimed person decided is laid down in clauses 2 to 7 of section 88.

CHAPTER XVI.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED.

The Enquiry.

Inquiry as to truth of information.

117. (1) When an order under S. 112 has been read or explained under S. 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under Sec. 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requiries security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section* (1), *the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or*

maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or, in default of execution, until the inquiry is concluded :

Provided that—

(*a*) *no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to execute a bond for maintaining good behaviour, and*

(*b*) *the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is a habitual offender *or is so desperate and dangerous as to render his being at large without security hazardous to the community* may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

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The Enquiry.

The enquiry is to be held in the presence of the person proceeded against whose personal attendance cannot be dispensed with in a case of security for good behaviour. An exemption is permissible in cases of security for keeping the peace. The Magistrate is to enquire into the truth of the information upon which action has been taken and he is to take such further evidence as may appear necessary. The expression "further evidence" necessarily implies some other evidence already referred to. What other evidence has already been taken by the Magistrate? Such further evidence is to be taken as may appear necessary. What is the scope of this provision?

Procedure.

Under Sec. 117 Cl. 2 in enquiries under Secs. 108, 109, 110, the procedure for conducting trials and recording evidence in warrant cases should as nearly as may be practicable be followed with the exception that no charge need be followed.

The procedure for warrant cases is to be found in Chap. XXI of the Code Secs. 252 to 257. (*N.B.* The sections are printed at pages 94 to 98).

Under Secs. 252 to 256 an accused cannot be called upon to enter upon his defence until the prosecution closes its case and no further evidence can be admitted against the accused except under Sec. 540 for which there must be valid reasons which must be recorded. (*Ganga Sing* v. *Emp. 10 A.L.J. 383, Emp.* v. *Lansha 4 Bur. L. T. 24*).

Sec. 256 being applicable the record should show whether the accused wished to cross-examine any of the witnesses for the prosecution already examined and should if he wishes be allowed to cross-examine them (*Emp.* v. *Lansha 4 Bur. L. T. 24*).

In proceedings under Sec. 110 the parties are entitled to recall prosecution witnesses for cross-examination. (*Crown* v. *Ahmad Baksh 1 Punj. Record Cr 1916 S. C. 17 Cr. L. J. 84*).

The Magistrate should give an opportunity to the person called upon to furnish security for good behaviour to cross-examine the witnesses against him after he is called on for his defence.

The Calcutta High Court has however held that Sec. 256 has no application to a case under Sec. 110 and the accused has no right to further cross-examine the prosecution witnesses under that section when he has once cross-examined them. (*Chinta Mon Sing* v. *King Emp. 35 Cal. 243*).

The same view has also been taken by the Lahore High Court in *Birga* v. *Crown 8 Lahore 265*.

It has been said that the reason of the rule in Sec 256 is that in warrant cases it is only when the charge is framed that the accused comes to know the definite charges which he is to meet. In cases of security for good behaviour he knows what he has to meet as soon as the proceedings are drawn up.

252—(1) When the person proceeded against appears or is brought before the Magistrate such Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate shall ascertain from the prosecution or otherwise the names of any person likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and shall summon to give evidence before himself such of them as he thinks necessary.

256—(1) The person proceeded against shall be required to state at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and after cross-examination and re-examination (if any) they also shall be discharged.

The person proceeded against shall then be called upon to enter upon his defence and produce his evidence.

(2) If the person proceeded against puts in any written statement the Magistrate shall file it with the record.

257—(1) If the person preceeded against after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that when the person proceeded against has cross-examined or had the opportunity of cross-examining any witness under Sec. 256 the atendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court.

Sec. 257 is imperative. A Magistrate has no discretion to refuse to issue process to compel the attendance of any witness unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such grounds must be recorded by him in writing. A Magistrate therefore must issue the summons for each witness named unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or for defeating the ends of Justice. The case of each witness must be dealt with individually. (*King Emp.* v. *Purshothan Kera 26 Bomb. 418 S.C. 4 Bomb. L.R. 38*).

Mode of recording Evidence.

The evidence is to be recorded as nearly as may be practicable in the manner prescribed for recording evidence in warrant cases. Chap. XXV of the Code.

The mode of recording evidence in warrant cases is laid down in Sec. 356 and the following sections of the Code. (*N.B.* The sections are printed at pages 99 to 102)

The Privy Council Ruling as to the reading over of deposition.

Under the ruling of the Judicial Committee in *Rahman* v. *Emp. 31 C. W. N. 271* all depositions in cases other than summons cases, with the exception of formal ones, should be read over to the witnesses in a manner so as to make it possible for the accused or his pleader to listen to what is being read over and to attend to any corrections made.

Record of Presidency Magistrates in bad livelihood cases.

(*N.B.*—Sections 362 and 406 are printed at pages 102 and 76 respectively).

Before the amendment in 1923 a Presidency Magistrate had under section 362 to record the evidence of witnesses in every case in which he inflicted a sentence of fine exceeding two hundred rupees or imprisonment for a term exceeding

six months. Such sentence made the case appealable to the High Court. That indicated a case of conviction for an offence and it was held that section 362 did not apply to cases under section 110 when the accused failed to furnish security and was detained in prison pending reference to the High Court under section 123. Before 1923 there was no appeal in cases for bonds under Chapter VIII decided by Presidency Magistrate the only provision for appeal in cases of bonds was in section 406 which provided that any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate to give security for good behaviour might appeal to the District Magistrate.

Section 406 has been amended and now any person ordered to give security for keeping the peace or for good behaviour may appeal against such order if made by a Presidency Magistrate to the High Court and if made by any other Magistrate to the Court of Session. Section 362 has been amended so as to make the recording of evidence by a Presidency Magistrate compulsory in every case in which an appeal lies and by Sub-section 2-A introduced for the first time in 1923 it has been made incumbent on the Magistrate in all such cases to make a memorandum of the substance of the examination of the accused.

Every case of bond under Chapter VIII decided by a Presidency Magistrate is now appealable to the High Court and in all such cases evidence must be recorded under section 362 under which the Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court.

All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Evidence so taken down shall ordinarily be recorded in the form of a narrative but the Magistrate may in his discretion take down or cause to be taken down any particular question or answer.

In every case the Magistrate shall make a memorandum of the substance of the examination of the person proceeded against. (*Shiekh Piru* v. *Emp.* 41 *C. L. J.* 142).

Such memorandum shall be signed by the Magistrate with his own hand and shall form part of the record. (Sec. 362).

The applicability of sections 360, 361, and sub-section 2-A of section 362 depends on the interpretation of the word accused as used therein. According to the decision of the Full Bench of the Calcutta High Court in *Narendro Chandra Rudra Pal* v. *Subrali Bhuiya 29 C. W. N. 701* a person proceeded against under Chapter VIII of the Code is not an "accused" within the meaning of the aforesaid sections and therefore those sections may not be applicable to enquiries under Chapter VIII of the Code but much can be said against this view. (*See* earlier note in Chapter III).

So far as persons proceeded against under Chapter VIII of the Code are concerned there cannot be any doubt that they are accused persons within the meaning of the Code generally and therefore within the meaning of the aforesaid sections.

The decisions in *Nawab Ali* v. *Emp. 52 Cal. 470* and *Sanatan Bhattacharya* v. *Emp. 51 Cal. 632* are direct authority for the proposition that section 360 applies to proceedings under section 117 Cr. P. C. These dicisions have not been expressly over-ruled by the Full Bench decision nor is there any reference to them either in the arguments or the judgments. The only point referred to the Full Bench was whether the provisions of section 360 Cr. P. C. are applicable to an enquiry held under section 145 Cr. P. C. and the decision of the majority of the Full Bench was that the provisions of section 360 do apply to proceedings under section 145 Cr. P. C. but parties to a proceeding under section 145 are not "accused" and their attendance at the reading over of the depositions is not necessary.

The amendment of section 362 by the addition of sub-section (2-A) makes it abundantly clear that persons proceeded against for security for keeping the peace or for good behaviour are accused persons.

Section 362 as it now stands provides that in every case tried by a Presidency Magistrate in which an appeal lies there

is no exemption from the making of a record of the evidence which exemption such Magistrates have the advantage of in other cases under sub-section 4 of that section. Therefore in every case of inquiry under Chapter VIII of the Code whether for keeping the peace or for good behaviour evidence has to be recorded by a Presidency Magistrate.

Along with the other changes made in section 362 and section 406 the legislature has added sub-section 2-A to section 362 under which in all cases in which an appeal lies the Presidency Magistrate is bound to make a memorandum of the evidence of the accused. The words used in sub-section 2-A are "in every case referred to in sub-section (1), *i.e.*, in which an appeal lies." This is very significant. The legislature makes the making of a memorandum of the substance of the examination of the accused compulsory in every case in which an appeal lies.

The existence of an accused in every such case follows as a matter of course and to say that the memorandum of the substance of the examination of a person proceeded against under the security sections is not to be made because such a person is not an accused is to read something into the section which is not there and to arrogate the functions of the legislature which could have and undoubtedly would have made an exception in the case of security proceedings if it had the intention of excluding them from the operation of sub-section 2-A.

Before the amendment section 362 made it necessary for a Presidency Magistrate to record evidence only in a case in which he imposed a fine exceeding two hundred rupees or imprisonment for a term exceeding six months. The section as it then stood contemplated only cases of offences and it is significant that while making every order of security for keeping the peace or for good behaviour appealable the legislature has altered section 362 so as to make the recording of evidence and the making of a memorandum of the substance of the examination of the accused compulsory in every such case.

The addition of sub-section 2-A to Sec. 362 coupled with the alterations made in sub-section (1) of Sec. 362 and in Sec. 406 is the clearest indication that the legislature when overhauling the Code in 1923 intended that a person proceeded against under Sec. 117 should come within the category of an accused.

Person proceeded against not a competent witness.

The person proceeded against for security for good behaviour cannot offer himself as a witness in the proceeding. Clause (2) of Sec. 340 makes this permissible for a person proceeded against under Sec. 107. (*N.B.*—Sec. 340 is printed at page 39).

Clause (2) is an exception to the general rule that an accused person cannot offer himself as witness.

Right to be defended by a lawyer.

The person proceeded against may of right be defended by a Pleader or a Mukhtar authorised under any law for the time being in force to practise in the Court of the Magistrate or by an advocate, a Vakil or an Attorney of a High Court so authorised or by any other person appointed with the permission of the Court to act in the proceeding (Cl. 1 of Sec. 340 —Cl. (2) Sec. 4).

Any person, even one who is not a lawyer, may be permitted by the Court to conduct the defence in a case.

One of the most important amendments of the Code made in 1923 is that of Sec. 340. Before the amendment Sec. 340 provided that "every person accused before any Criminal Court may of right be defended by a pleader".

There was no provision corresponding to that of Sub-Sec. (2). This was the law both in the Codes of 1882 and 1898. In the earlier Codes every person "charged before any Criminal Court with an offence" had the right of being defended by a lawyer. (Sec. 186 of Act X of 1872, Sec. 432 of Act XXV of 1861.) The form in which Sec. 340 was enacted in the Code

of 1882 so as to give the right of being defended by a lawyer to every person "accused before any Criminal Court" was intended to be an improvement on the earlier law. Evidently the intention of the legislature was to extend the right in question to persons not accused of offences but all the same proceeded against under one or other of the provisions of the Code. This right could not certainly be claimed by such persons under the Codes of 1861 and 1872.

When the Code of 1882 was in force it was held in *Jhojha Sing* v. *Q. E. 23 Cal. 493* that a person proceeded against under the provisions for taking security for keeping the peace or for good behaviour was an accused in the sense that he had a right to be defended by a lawyer. The interpretation put on the word "accused" was that it meant a person over whom the Criminal Court exercised Jurisdiction. This was in accordance with the view taken in *Emp.* v. *Monna Punna 16 Bomb. 661* decided under the Code of 1872. There can be no doubt as to the object of the legislature in enacting Sec. 340 in the form in which it was in the Code of 1882—a comparison between that section and the corresponding provisions of the earlier Codes makes it quite clear.

Sec. 340 was kept intact when the Code of 1898 was passed evidently because it was thought that the words "every person accused before any Criminal Court" were comprehensive enough to include both person accused of one offence and those against whom some proceedings under the Code are taken though they are not accused of any offence. This was the view taken by the Allahabad Court in *Emp.* v. *Gerand 25A 375.*

During the long period during which this Code was current doubts were expressed from time to time whether the latter class of persons mentioned above could as of right claim to be defended by a lawyer and the legislature in order to remove all doubts and definitely to secure the valuable right in question to all persons who may have to appear in a Court of law either being accused of an offence or charged with conduct which if proved may lead to an order against him regulating his conduct generally or with reference to any

property has while amending the Code in 1923 enacted sub-Sec. 1 of the Sec. 340 in the present form.

The sub-section (1) shows that there are besides persons accused of offences other accused persons against whom various proceedings under the Code may be taken.

In sub-section 2 the legislature simply removed in the case of some particular classes of accused persons a disability which ordinarily attaches to accused persons.

According to the interpretation put on this amendment of Sec. 340 by a Full Bench of the Calcutta High Court in *Narendro Chandra Rudra Pal* v. *Subarali Bhuiya 29 C. W. N. 701* the intention of the legislature is that whenever the word "accused" occurs by itself in the Code it means a person accused of an offence and in this view the sections of the Code dealing with general provisions as to conducting trials or recording evidence in which the word "accused" is used by itself have no application to enquiries against persons who are not accused of an offence but against whom proceedings are taken under the Code. But this view is untenable and the amendment in question lends support to the opposite view. The objection raised to persons proceeded against in proceedings mentioned in sub-Section (2) of Sec. 340 being considered as "accused" on the ground of the inconsistency arising out of the application of Sub-sec. 4 of Sec. 342* that no oath shall be administered to the accused is groundless.

*342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other enquiry or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused

That sub-section prohibits administration of oath to the accused for the purpose of his examination under sub-Sec. (1)

Sub-section 1 is the principal provision empowering the Court at all stages of enquries into and trial for an offence to put questions to the accused for the purpose of enabling him to explain circumstances appearing in the evidence against him and making such questioning compulsory at a particular stage. Sub-section 2 deals with the refusal of the accused to answer the questions aforesaid. Sub-section 3 deals with the use to which the answers given by the accused to such questions may be put.

Sub-section 4 prohibits the administration of oath to the accused when answering such questions. Before the amendment in 1923 no other kind of examination of the accused was provided for in the Code but now in sub-section (2) of Sec. 340 another kind of examination of the accused who are not accused of an offence but who are nevertheless proceeded against in the Criminal Court under certain provisions of the Code is provided for. For such an examination the Code does not either make the administration of oath permissible nor does it prohibit it. The matter then depends on the Indian Oaths Act under Sec. 5 of which no oath can be administered to the accused in a criminal proceeding but it must be made by a witness.

The examination of a person proceeded against in proceedings mentioned in sub-section (2) of Sec. 340 is voluntary and by a voluntary offer such a person makes himself a witness in his own case by virtue of a provision when his disability to give evidence is removed by the exercise of his own option and he must be examined as all other witneses and must make an oath or affirmation. The answers given in such examination are not in any way protected as those elicited under Sec. 342 sub-section (2).

Examination of accused.

Sec. 342 of the Code is not applicable to persons proceeded against under the Code but not accused of an offence. Sub-

section 3 indicates that the section contemplates only inquiries into or trials for offences. (*See Benode Behary Nath* v. *Emp.* 50 *Cal.* 985).

But in cases tried by a Presidency Magistrate the Magistrate is bound to make a memorandum of the substance of the examination of the person proceeded against (the accused) under Sec. 362 sub-section 2-A (Shiekh Piru 41 C. L. J. 142 per Mukherji J.) (N.B. Section 362 is printed at page 102).

No influence to be used to person proceeded against to induce disclosures.

There is nothing in Sec. 343 which prevents a person proceeded against under the security sections from getting advantage of it.

Adjournment.

Power to postpone or adjourn proceedings.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Remand

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Reasonable cause for remand.

540-A. (1) *At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.*

Provision for inquiries and trial being held in the absence of accused in certain cases.

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.*

If the person proceeded against is in custody for failure to furnish bail on arrest under the proviso to sec. 114 or for failure to furnish *ad interim* security under sub-sec. 3 sec. 117 the Magistrate may at the time of making an order of adjournment remand the accused, the maximum limit of remand to custody being fifteen days at a time.

Sec. 344 provides that the Magistrate may by a warrant remand the accused if in custody but in no case the remand shall extend over a period exceeding fifteen days at a time. In a case of enquiry under Chapter VIII the only circumstances

in which the person proceeded against may be detained in custody are those contemplated by *clause 3 of Sec. 117* when in the opinion of the Magistrate an *ad interim* bond is necessary and this is not forthcoming *and the proviso to sec. 114* when the person proceeded against is arrested by the Magistrate in order to prevent a breach of the peace and he is unable to furnish bail. When a person proceeded against under Chap. VIII. is in custody in the circumstances referred to above the Magistrate may make an order of remand in terms of Sec. 344 up to a period of fifteen days along with an order of adjournment.

Local Inspection.

(N B Sec. 539-B is printed at page 101).

Under Sec. 539-B the Magistrate may at any stage of the enquiry after due notice to the parties inspect any place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at the enquiry and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection. Such memorandum shall form part of the record of the case. If the accused so desires a copy of the memorandum shall be furnished to him free of cost. Taking the person proceeded against to be an accused the copy must be given to him free of cost. Having regard to the issues involved in an enquiry for good behaviour it is hardly conceivable that it may be necessary for the Magistrate to hold a local inspection for the purpose of appreciating the evidence although such inspection may be necessary in many cases under Sec. 107.

Courts to be open.

It is curious to note that Sec. 352 which makes a Criminal Court open to the public is limited only to courts held for the purpose of enquiring into or trying an offence so that under the Code of Criminal Procedure there is no injunction for an enquiry under Chap. VIII of the Code being held in an open Court. But under sub-Section 6 of Sec. 367 added for the first

time in 1923 an order under Sec. 118 is a judgment for the purpose of Sec. 367 under sub-section 1 of which such an order must be dated and signed by the presiding officer in open Court at the time of pronouncing it.

Change of Magistrate.

350. (*1*) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the inquiry or trial:

Provided as follows:—

(*a*) in any trial the accused may when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

(*b*) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby and may order a new inquiry or trial.

(*2*) Nothing in this section applies to cases in which proceedings have been stayed under section 346 *or in*

which proceedings have been submitted to a superior Magistrate under section 349.

(3) *When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section (1).*

If after evidence has been partly recorded by a Magistrate he is succeeded by another or the case is transferred to some other Magistrate the second Magistrate may act on the evidence recorded by his prodecessor or partly recorded by his predecessor and partly by himself or he may resummon the witnesses and recommence the inquiry. (Sec. 350).

The section speaks of an enquiry or trial and there is no difficulty about a case of security for keeping the peace or for good behaviour coming within the scope of the section.

But the question as to the application of the proviso to the section to security proceedings is not free from doubt.

Can the person proceeded against demand when the second Magistrate commences his proceedings that the witnesses or any of them be resummoned and re-examined?

Such a right has been given by proviso (*a*) section 350 to the "accused in any trial."

The distinction between an enquiry and a trial in the Code is apparent although "trial" is not defined therein and a proceeding under Chapter VIII of the Code cannot come under the category of a trial. But it is an enquiry and apart from the contentious discussion as to the meaning of the word "accused" the right in question cannot be claimed by an accused who is not accused of an offence but who is proceeded against in an enquiry.

A reference to section 366 and 367 shows that trial means trial for an offence. The addition of clause 6 to section 367 by the amending Act of 1923 confirms this view. Under this clause an order under section 118 as also under section 123 in

enquiries for security under Chapter VIII of the Code "shall be deemed to be a judgment." This shows that but for this special provision these orders passed in proceedings under the Code other than trial for offences would not have been judgments within the meaning of section 367 which lays down what a judgment in a trial should be.

A Full Bench of the Madras High Court has however taken a different view and has held that under proviso (*a*) of section 350 the accused in a security case is entitled to a trial *de novo* on the Magistrate being transferred. (*Elachuri Venkata Chinnayya* v. *Emp.* 43 *Mad.* 510). Such a liberal interpretation from the point of view of an accused person is welcome but there is the difficulty pointed out above. In favour of the view it may be said that the decision of the Full Bench was given in 1920 and the legislature in amending the Code in 1923 did not differ from it in the sense that it did not introduce any amendment of the section for the purpose of nullifying the effect of the decision in question.

In this connection section 559 which is an entirely new provision substituted for the section bearing the same number by the amending Act of 1923 should not be lost sight of. It lays down a general provision that subject to the other provisions of the Code the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.

When there is any doubt as to who is the successor in office of any Magistrate the Chief Presidency Magistrate in a Presidency town and the District Magistrate outside such towns shall determine by order in writing the Magistrate who shall for the purpose of this Code or of any proceedings or order thereunder be deemed to be the successor in office of such Magistrate.

Joint enquiry.

When two or more persons have been associated together in the matter under enquiry they may be dealt with in the same or separate inquiries as the Magistrate shall think just. (Cl. 5 section 117).

Joint enquiry when permissible.

Although in cases of joint enquiry there is a danger of one accused being prejudiced through the evidence against another which does not directly affect him being on the record the law nevertheless allows joint enquiries under section 117 cl. (4) (now cl. 5) of the Code. (*Sheo Shahai* v. *Emp. 20 Cr. L. J. 750*).

Unless the circumstances mentioned in clause 5 of Sec. 117 namely the association of several persons in the commission of the offences mention in Sec. 110 is established joint trial of several persons in a proceeding for security for good behaviour is illegal ; the accused will be necessarily prejudiced by such an illegal joint trial. (*Jai Sai* v. *Emp. 1923 Pat. 8*).

In a proceeding under Sec. 110 there is no direct prohibition against trying a number of persons jointly but unless it is apparent that the various persons against whom proceedings are taken form a gang it is highly unfair and unjust that they should be tried jointly. (*Mahomad Ismail* v. *Emp. 21 A. L. J. 841*).

Ordinarily proceedings against a man for *Budmashi* should be confined to him alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable (*Aughoo Sing* v. *Emp. 45 All. 109 S. C. 20 A. L. J. 88*).

It is only where several persons are jointly concerned in a matter under enquiry under the preventive sections that a joint enquiry is permissible. (*Kava Tham Pathe Raja 26 M. L. J. 385*). There can be no joint enquiry against men whose association in an offence is not made out (*Crown* v. *Chuni Bhuru 16 Cr. L. J. 136*). The mere fact of being members of an undivided family does not justify joint enquiry (*Kripa Sindhu Naik* v. *Emp. 1918 M. W. N. 751*) but it is permissible when it appears that the persons proceeded against who were members of the same family were associated together and formed a gang (*Parasulla v. Emp. 13 C. W. N. 244*).

A joint enquiry against the members of a gang formed for the purpose of habitually cheating in concert is not illegal though they were not at all concerned together in each of the

various acts alleged against them (*Kalu Mirza* 37 *Cal.* 91) and the joint trial in a proceeding to take security for good behaviour of several persons who were habitually associated together for committing offences is not illegal merely because they did not belong to the same village. (*Rahim Bux Pramanik* v. *Emp.* 64 *Indian Cases* 842).

The association of the several persons in the commission of the offences mentioned in Sec. 110 must be established in order to entitle the Magistrate to try them jointly. A joint trial of several accused in a proceeding under Sec 110 on the allegation that they formed a gang habitually dealing in stolen goods is illegal if the evidence does not establish that they are associated together in that purpose. Such a joint trial will necessarily be prejudicial to their case and is not a mere irregularity. (*Jai Rao* v. *Emp.* 23 *Cr. L. J.* 700).

It is doubtful if a finding by the Magistrate that the persons proceeded against are close neighbours and are found to be implicated in good many cases together is sufficient as justifying a joint enquiry held against several persons. (*Jai Rao* v. *Emp.* 23 *Cr. L. J.* 100).

Where the joint trial proceeded upon the police report of the two accused being associated but there was no evidence in court to substantiate any association and although at the trial seventeen first informations were put in and a number of witnesses were examined no specific instance of both the accused being jointly concerned in any theft, robbery or extortion, mischief, etc., was established it was held that the joint trial was prejudicial to the interests of the accused. (*Devdhari Panday* v. *King Emp.* 1925 *Pat.* 6).

Joint enquiry if permissible at all in cases under Cl. (f).

Section 110 contemplates in clauses (*a*) to (*e*) thereof persons who habitually commit the offences mentioned but in cl. (*f*) is contemplated one who is so desperate and dangerous as to render his being at large without security hazardous to the community. The provision contained in cl. (5) is an exception to the general rule that every accused person is to be tried

separately. It is analogous to Sec. 239 of the Code which allows in certain cases a joinder of several accused in one trial. The exceptional provision is to be applied when it strictly applies and in those cases only, the general rule of separate trial holding good in all other cases. Now the only ground on which a joint enquiry under Chap. VIII may be held is that the persons proceeded against are associated together in the matter under enquiry and the very nature of this condition in this enabling provision of law makes it clear that a joint enquiry may be held only in cases coming under any of the clauses (*a*) to (*e*) but not in a case coming under cl. (*f*). A person may be associated with others in the matter of habitual commission of offences contemplated by clauses (*a*) to (*e*) and a joint enquiry is permissible when the associates are proceeded against together. In such a case the matter under enquiry is the habitual commission of certain offences.

In a case coming under cl. (*f*) the matter under enquiry is whether the person proceeded against is a desperate and dangerous character and if several persons are to be proceeded against under Sec. 110 for being each a desperate and dangerous character it is impossible to hold a joint enquiry on the ground that they are associated together in the matter under enquiry. In all cases coming under cl. (*f*) if several persons are to be proceeded against separate enquiry should be held against each and cl. 5 of Sec. 117 is wholly inapplicable. (*See in this connection Kutti Goundan Inre. 47 M. L. J. 689*).

Srikanto Nath Shaha v. Emp. 9 C. W. N. 898.

The scope of the provision relating to joint enquiry viz., cl. 5 (formerly clause 4) Sec. 117 has been exhaustively considered in *Srikanta Nath Saha* v. *King Emp. 1 C. L. J. 616 S. C. 9 C. W. N. 898.*

Where two or more persons are associated together in the matter of extortion of Kabuliats at enhanced rates from the tenants of their master the Zamindar for his benefit the terms of Sec. 117 sub-section (4) (now sub-sec. 5) fully justifies a

joint enquiry against all those persons. (*Srikanto Nath Shaha per Rampini J.*).

When acts are done by two or more persons not in their own interests but in the course and within the scope of their employment in the interests of their master and under the orders express or implied of him or his agents, in such a case ordinarily those acts (*i.e.*, of the servants) would be primarily and properly attributable to the orders given and not necessarily to any association together for the purpose of committing the acts. If the servants of a Zamindar acting under orders of their master or out of zeal for their masters' interests or for any other reason join or associate themselves together for the purpose of committing acts of oppression upon the raiyats they will render themselves liable to punishment for any offence which they commit and if they are shown to have habitually committed extortion so as to bring them within the terms of Sec. 110 they are liable to give security for their good behaviour. The words "associated together" do not imply that the persons to whom they may be properly applied must have been acting in concert but that persons associated together in the matter of the enquiry must be persons shown to have been acting together in the various matters charged against them as grounds for binding them over to keep the peace. Where there is no such association together a joint enquiry is improper if not also illegal and such an enquiry prejudices the accused.

Where an enquiry is found to have been defective or improper and a question arises whether a fresh enquiry should be directed it is necessary to look to the evidence. Having regard to the information upon which the inquiry was started it might very well be a joint enquiry but if at a later stage it appeared that a joint enquiry might prejudice the persons concerned it would be the duty of the Magistrate to stop the enquiry and to institute separate enquiries. (*Srikanto Nath Shaha Per Henderson J.*).

The association which will give the Magistrate jurisdiction to deal in one proceeding with two or more persons must be alleged or implied in the initiatory order. It is the accusation

which must be considered to ascertain whether a joint trial is legal or not.

The proceedings will not be vitiated even if it should appear in the course of the enquiry that one or more persons called upon to show cause are not associated with those against whom there is sufficient reason for making the order absolute. The phrase "associated together" applies to persons acting in concert whether the concert is due to mutual agreement amongst themselves or in obedience to the orders of a common master. (*Srikanto Nath Shaha Per Geidt J.*).

Discretion of Magistrate in holding joint or separate enquiry.

A discretion is given to the Magistrate to decide whether the enquiry is to be joint or separate but the Magistrate must exercise his discretion judicially. A higher Court can set aside a final order for security if it finds that the joint enquiry held by the Magistrate was improper and prejudical to the accused.

When two or more persons are associated together in the matter under enquiry it is not incumbent on the Magistrate to hold a joint enquiry but it is open to him to do so if he thinks it just. Cl. (5) of Sec. 117 is an enabling provision before invoking which the Magistrate must exercise his discretion and decide whether without prejudice to the persons proceeded against the enquiry may be held jointly.

Material on which to decide joint or separate enquiry.

It is at the commencement of the enquiry that the Magistrate is to decide whether to proceed jointly or separately when several persons are proceeded against. It is but reasonable to suppose that the information on which the proceeding is drawn up is to be looked to for coming to a decision on this point.

The association which will justify the joint enquiry must be alleged or implied in the initiatory order and it is the accusation which must be looked to for ascertaining whether a joint enquiry is legal or not. (*Sri Kanto Nath Saha* v. *Emp.* 9 *C. W. N. 898 S. C. 1 C. L. J. 616 per Geidt. J.*)

The legality of a joint trial must depend on what is alleged for the prosecution not on the facts subsequently found to be true. (*Jogendro Kumar Nag.* v. *Emp.* 25 *C. W. N.* 334).

But it was held by Henderson J. in *Srikanto Nath Shaha* v. *Emp.* that having regard to the information before the Magistrate on which the enquiry was started it might very well be a joint enquiry but if at a later stage it appeared that a joint enquiry might prejudice the persons concerned it would be the duty of the Magistrate to stop the enquiry and to institute separate enquiries.

It has also been held that mere allegation that the accused were associated together in the commission of the offences is not sufficient. There must be proof of such association. (*Jai Sao* v. *King Emp.* 1923 *Pat.* 8).

Necessity of individual finding when enquiry Joint.

In cases of joint enquiry against several it is incumbent on the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person who is charged. (*Jai Govind* v. *Emp.* 15 *Oudh Cases* 262).

The Magistrate must arrive at a definite finding against each of the persons proceeded against individually.

Two opposite parties cannot be proceeded against jointly.

Persons in conflict with one another are not associated together within the meaning of the section and a joinder of enquiry in respect of such parties is an illegality and not a mere irregularity. (*Ganapati Bhatta* v. *The Emp.* 31 *Mad.* 276).

This decision follows the ruling of the Calcutta High Court in *Kamal Narain Chowdhury* v. *Emp.* 11 *C. W. N.* 472 in which it was held that two opposing parties in a dispute cannot be proceeded against and bound over to keep the peace in one proceeding. The learned Judges who decided the case considered the effect of the ruling in *Srikanto Nath Shaha* v. *Emp.* cited above and pointed out that it did not support the

view that two opposing parties can be jointly proceeded against under Sec. 107 though it laid down that several members of one party may be proceeded against jointly if it is clear that they were associated together with one common object of doing acts likely to lead to a breach of the peace.

Members of undivided family.

The mere fact that the persons charged are members of an undivided family would not by itself render each member liable for the misconduct of any other member and where they are living separately there is not even the presumption that one member knew and assented to the misdeeds of the other. When proceedings under section 110 were held against two undivided brothers who were living in two different villages ten miles apart and the courts below used evidence against one brother as evidence against the other brother as well and did not examine the evidence against each of the accused separately with a view to determine whether security should be demanded against him or not it has held that the procedure was illegal. (*Kripa Sindhu Naik* v. *Emp. 1918 M. W. N. 751 S. C. 19 Cr. L. J. 905*).

Applicability of cl. 5 of section 117 to all classes of cases of security.

The provision as to joint enquiry has been further considered by the Calcutta High Court and it has been observed that the insertion of sub-section 4 (now sub-section 5) in the Code of Criminal Procedure was intended to remove doubts as to the legality of taking joint proceedings against persons proceeded against under section 107 of the Code in cases like land or Hat disputes but the sub-section having been introduced into a section which deals with proceedings both under section 107 and 110 of the Code the view has been taken that a joint trial in a case under the latter section is permissible where there is evidence in the nature of a conspiracy or of acting in concert and that view cannot be questioned.

The legality of a joint trial must depend on what is alleged for the prosecution and not on the facts subsequently found to be true.

Rule against joinder of charges how far applicable.

The provisions relating to joinder of charges do not apply to an enquiry under section 110 (*Wahed Ali Khan 11 C. W. N. 789*) but the principle ought to be applied and whenever in security proceedings a plea of misjoinder is raised the test to be applied is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint (*Kripa Shindu Naik* v. *Emp. 1918 M. W. N. 751*). The same view was taken by Mr. Justice Gooroodas Banerji in *8 C. W. N 180* where that eminent judge held that the principles relating to joinder of charges in trials are applicable to enquiries under section 110 of the Code.

Dictum of the Judicial Committee in Subramanya Ayar's case, applicability of.

The dictum laid down by the judicial committee in *Subramanya Ayar* v. *King Emp. 25 Mad 61* that disobedience to an express provision as to a mode of trial is not a mere irregularity applies to a case where a joint trial has been held contrary to a provision in the Code which directs separate inquiries in the case of proceedings under section. 110 (*Jogendra Kumar Nag* v. *King Emp. 25 C. W. N. 334*).

CHAPTER XVII.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS PERSONS CONTINUED.

ENQUIRY ON EVIDENCE.

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Under section 117 in the presence of the person proceeded against the Magistrate is to enquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary.

There must be an enquiry as to the truth of the information on evidence.

Where a Magistrate called one person to furnish security for keeping the peace relying on the statements of certain persons charged under Secs. 147 and 325 I. P. C. and tried by him it was held that the Magistrate was bound to make an enquiry as to the truth of the information and as there was no such inquiry the order was bad and must be set aside. (*Mulchand* v. *King Emp.* 37 *All.* 30 *S. C.* 12 *A. L. J.* 1262).

The Magistrate is to take such further evidence as may appear necessary.

"Further evidence" has been interpreted to refer to evidence *ejusdem generis* with the evidence already described. (*Emp.* v. *Jaggan 36A 239 Per Knox J.*).

Defence Evidence.

It is the duty of the Court in every case to give due weight to the evidence adduced by the defence but in a case under Sec. 110 when the legislature has made a departure from the general rule in making evidence of general repute admissible against a person proceeded against under the section, in other words, in permitting evidence of bad character to be given against the accused it is doubly incumbent on the Court to pay special attention to the evidence for the defence. As pointed out in the case of Rai Ishri Pershed 23 Cal. 621 a man's general reputation is the reputation which he bears in the place in which he lives amongst his townsmen and these are the people who are most competent to testify as to the genreal reputation of a fellow citizen and if they come forward to give him a good character no restraint should under the law be put on his liberty. The very object of the section is to afford these townsman protection against persons who are alleged to be habitual offenders but if these latter are not so in the estimation of those whom it is intended to protect there is no reason why their liberty should in any way be restricted.

In proceedings under section 110 where the accused is able to produce witnesses on his behalf to speak to his good character the Court ought to pay particular attention to such evidence. Such evidence need not necessarily be believed but the Court should find substantial reason for not believing the evidence before it makes an order. (*Hakim Sing* v. *Emp. 13 A. L. J. 1055 S. C. 16 Cr. L. J. 810 ; Amjad Ali* v. *Emp. 25 Cr. L. J. 35 ; Ramlagan Ahir* v. *Emp. 1924 Pat. 500*).

Where a Court disbelieves the evidence adduced by an accused person it ought to record specific reasons for such disbelief. The mere fact that assuming the accused is guilty it was easy for the accused to get witnesses of fairly good status to give evidence on his behalf is no ground for disbelieving the witnesses. (*Jabruddin* v. *Emp. 20 Cr. L. J. 689*).

It is not open to the Magistrate arbitrarily to limit the number of defence witnesses to the same number for example as were examined for the prosecution. (*Aminulla Pramanik* v. *Emp. 22 C. W. N. 408*).

Opportunity to adduce defence evidence.

The accused must have time to bring his witnesses and have their evidence recorded. (*Keramuddin Sikar* v. *Emp. 41 Cal. 806 S. C. 15 Cr. L. J. 353*).

In a case warrants were issued against the absent witnesses for the defence and on the next date of hearing only one of them was present. It was stated by the Magistrate in his explanation to the High Court that neither the accused nor his Mukhtear applied for further process against the witnesses. On the Mukhtear refusing to argue the case judgment was delivered. It was held that under the circumstances of the case the accused should be given further opportunity of examining his witnesses. (*Ponthiram* v. *Emp. 38 C. L. J. 285 S. C. 25 Cr. L. J. 293*).

Magistrate's duty to compel attendance of witness.

It is the duty of the Magistrate after he has once issued process to enforce the attendance of the witnesses in question and where there is nothing to show that the accused gave up these witnesses it does not relieve the Magistrate of the responsibility cast upon him merely because the accused does not again ask for fresh process. The time for exercising his discretion whether or not to issue process against a defence witness is when the application under Section 257 is filed and if this application is not rejected by the Magistrate as made for the purpose of vexation and delay and for defeating the ends of justice but process is granted it is incumbent on the Magistrate to enforce the process of the Court once issued. The question becomes one between the Court and the witness and not between the Court and the accused and Magistrates should never forget this.

Evidence justifying order.

Quality and not quantity of evidence to decide.

It is on evidence that the Magistrate should judicially determine the necessity or otherwise of making an order for security and it is the weight of the evidence and not the number of witnesses which the Court has and ought to consider.

In one case a Magistrate took the quality of the witnesses and dismissing on both sides those whose evidence he considered faulty considered fifteen witnesses to be reliable on the side of the prosecution and ten on the side of the defence. Then he went by the vote of the majority and decided against the defence. It was held that the order of the Magistrate was illegal. The fact that the ten witnesses who were considered to be respectable and reliable had deposed that the petitioners were men of good character entitled them to an acquittal. (*Bahadur* v. *Emp. 10 Oudh and Agra Law reporter 1014*).

Inadmissible evidence to be excluded.

Sec. 110 coupled with sec. 117 gives very extensive powers to Magistrates and should be administered with scrupulous care and materials ought not to be brought on the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused. (*Jabruddin* v. *Emp. 20 Cr. L. J. 689*).

Evidence to be specific as to charge.

It must be made clear to the person proceeded against as to which sub-section he is charged with coming under and the evidence led in must prove the specific charge. General evidence of bad character does not bring him within the section 110. (*Sohan Sing* v. *Emp. 26 Cr. L. J. 1377*).

Evidence of repute.

Evidence of general repute was formerly admissible only in cases of habitual offenders but now it is available also for the purpose of showing desperate and dangerous character (cl. 4 sec. 117). Notwithstanding this change in the law the observations of Amir Ali and Pratt J. J. in *Kalai Haldar* v. *Emp. 29 Cal. 779* may be referred to as laying down a wholesome rule which should be

followed. The accused should be proved to be a desperate and dangerous character by evidence of persons who of their own personal knowledge can speak to specific acts by him showing him to be of such character. The evidence of persons however respectable, who have no personal knowledge of the accused ought not to be admitted to prove his character.

Stereotyped evidence.

In a case of enquiry for security for good behaviour merely because a large number of witnesses give evidence which is of a pattern that accused is a thief and a dacoit and that the neighbourhood is of that opinion the Magistrate is not justified in making an order for security for good behaviour. (*Raghudait* v. *Emp. 24 Cr. L. J. 791*),

Equally balanced evidence.

No order under the section for security for good behaviour should be made when the evidence on both sides is equally balanced. (*Ganga Sing 10 A. L. J. 383 Rahm Ali* v. *Emp. 11 A. L. J. 461*).

Prosecution to prove charge.

The question is not whether the evidence for the defence outweighs the evidence for the prosecution but whether the latter is sufficient to establish the case against the accused. (*Sadat Ali* v. *Emp. 58 I. C. 826*).

History sheets kept by the police.

A judge should not delegate his judicial functions to the police and history sheets kept by the police of persons proceeded against for bad livelihood cannot be taken into consideration by the Court. (*Jogendra Kumar Nag* v. *Emp. 21 Cr. L. J. 700*) especially when the official who produces them is not himself responsible for all the entries therein (*Jabruadin* v. *Emp. 20 Cr. L. J. 689*).

Extracts from administration report.

Extracts from the Magistrates' administration report appearing in the District Gazetter and which contained reflections on the petitioner's conduct as landlord and upon which he relied to show that his treatment by the Magistrate leading up to the institution against him of proceedings under section 110 was in harmony with the views exposed in the Administration Report were relevant and admissible in evidence. (*Rajendro Narayan Sing* v. *Emp. 17 C. W. N. 238*).

Evidence of good character.

In a case the accused was continuously for a period of ten or eleven years employed as a servant of a particular person. He was suspected by his master of burglary and prosecuted. He was discharged and proceedings were taken against him under section 110. He produced evidence to show that his character when he was in the service of his former master was satisfactory. It was held that such evidence was material to the case. (*Shamlal* v. *King Emp.* 6 *A. L. J.* 487).

Possession of co-accused.

Where a joint enquiry is being held against several persons associated together in the matter under enquiry the possession by one of the accused of seditious literature can be considered by the Court for the purpose of ascertaining the object of the association even if it be assumed that the literature was brought by the accused in whose possession it was found before the other joined the association. (*Monindra Mohan Sanyal* v. *Emp.* 23 *C. W. N.* 193).

Confession.

A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under section 110. (*Aminulla Pramanik* v. *Emp.* 22 *C. W. N.* 408).

Uncorroborated testimony of accomplice.

An order for security for good behaviour made on evidence portions of which are inadmissible as being hearsay evidence and also on evidence of an accomplice which has not been corroborated in material particulars is bad. (*Ashutosh Das* v. *Emp.* 23 *Cr. L. J.* 189).

Previous conviction.

Previous convictions are not substaintive evidence in a case under section 110 though they may have an effect in deciding the duration of the bond. (*Emp.* v. *Nepal Shikary* 13 *C. W. N.* 318 *S. C.* 9 *C. L. J.* 439). These must be proved strictly (*Emp.* v. *Sheikh Abdul* 43 *Cal.* 1128 *S. C.* 20 *C. W. N.* 725).

General repute cl. (4) section 117.

Under clause 4 of section 117 the fact that a person is an habitual offender or is so desperate and dangerous as to render

his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise. Before the amendment in 1923 under cl. 3 of sec. 117 evidence of general repute was admissible only to prove the fact of being an habitual offender but now such evidence has been made admissible for the purpose of showing desperate and dangerous character also. The fact of being a habitual offender or a desperate or dangerous character may be proved by evidence of general repute or otherwise, *i.e.*, in addition to the evidence which may be admitted under the general law of evidence a special kind of evidence, *viz.*, that of general repute is made admissible by a special provision but for which such evidence would have been excluded. Under section 54 of the Evidence Act in criminal proceedings the fact that the accused person has a bad character is irrelevant unless evidence has been given that he has a good character in which case it becomes relevant. That being so the prosecution would not be in a position to adduce evidence to show that the person proceeded against for bad livelihood is known by people amongst whom he lives to be a bad character. A special provision was therefore necessary to make such evidence admissible

In Emperor v. *Kalumal* (*1904 A. W. N. 140*) Blare J. observed "Though it is not very clear what the precise meaning of the words "by evidence of general repute or otherwise" as used in Sec. 117 may be it was the intention of the legislature that the Magistrate should use a very large discretion as to the evidence which he may admit in proceedings under Sec. 110 and the following sections of the Code.

A man's general reputation is the reputation which he bears in the place in which he lives amongst his townsmen (*Rai Ishri Pershed 23 Cal. 621; Katabdi* v. *Emp. 27 Cal. 993 S. C. 5 C. W. N. 29 ; Emp.* v. *Jagannath 1903 A. W. N. 181*) because these people have an opportunity of knowing him. People who are not in this position cannot testify to the general reputation of a man.

Evidence of cases in which a man was suspected of having committed a crime is no evidence of general repute (*Raham*

Ali v. *Emp. 11 A. L. J. 461 ; Ahmjed Ali* v. *Emp. 25 Cr. L. J. 35*).

Mere suspicion is not sufficient to bind a man down to be of good behaviour under Sec. 110. The evidence ought to be of such a nature as to lead to a reasonable and definite ground for concluding that the petitioner is a habitual offender. (*Amjal Ali* v. *Emp. 1924 Pat. 498 S. C. 25 Cr. L. J. 35*).

But it has been held that when independent evidence of the accused's reputation has been given evidence that he has been suspected in a number of instances may be admissible as corroboration. (*Sanku* v. *Emp. 24 Cr. L. J. 608*).

Where the only evidence against the accused is that of general repute that repute should be proved to be universal and there should be no doubt about it. (*Absullah* v. *Emp. 25 Cr. L. J. 314*).

The decision of Petheram C.J. and Beverly J. in the case of *Rai Ishri Proshad* cited above (23 Cal. 621) has always been recognised as the leading case on the question of general repute. It lays down the following propositions.

Evidence that these are rumours in a particular place that a man has committed acts of extortion on various occasions, that he has *budmashes* in his employ to assist him and generally that he is a man of bad character is not evidence of general repute under Sec. 117.

Evidence of rumour is mere hearsav evidence of a particular fact Evidence of repute is a different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen whether they know him or not as a man of good repute that is strong evidence that he is a man of good character. On the other hand if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits that is strong evidence that he is a man of bad character.

It cannot be said that because these are rumours in a particular place among a certain class of people that a man has

done particular acts or has characteristics of a certain kind those rumours are in themselves evidence under Sec. 117.

The dictum of Sir Comer Petheram about general repute has been repeated in subsequent cases. (*Emp.* v. *Juggan Nath 1903 A. W. N. 181 ; Jogendro Kumar Nag* v. *Emp. 25 C. W. N. 334*).

Rumour that a man is a bad character is not evidence of general repute and when the evidence for the defence to the effect that the accused is a man of good character is as weighty or weightier than the evidence for the prosecution it cannot be held as proved that the accused is by general repute a bad character. (*Rajendro Prossad Sahi* v. *King Emp. 1 A. L. J. 611*).

When it is sought to prove the reputation of a person the evidence required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. The test of the admissibility of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not merely be the repetition of what certain persons have said to the witness. (*Kotha Midde Ranga Reddi Inre 43 Mad. 450 S. C. 38 M. L. J. 97 per Moore J.*)

Evidence of general repute alone given by witnesses who have no personal knowledge about the accused person and who are entirely ignorant about his business and circumstances does not justify an order to furnish security. (*Kallu* v. *Emp. 19 A. L. J. 39 S. C. 22 Cr. I. J. 314; Aughoo Sing* v. *Emp. 20 A. L. J. 881 S C. 45 All. 109*).

The evidence of repute to justify an order must be very strong and almost universal.

The evidence of an enemy or the personal knowledge of the Magistrate cannot be the basis of an order. (*Wali Mahommad* v. *Emp. 25 Cr. L. J. 808*).

Mere belief and information without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute.

The evidence must be of persons who are acquainted with the accused and live in the neighbourhood and are themselves aware of his reputation.

It must be an opinion formed by the witnesses from specific cases coming to their knowledge and not merely from reports or rumours received from others. For instance where a witness says that to his knowledge a certain person is a theif or a house-breaker by habit and on being pressed to give the source of his knowledge he merely says that there is a rumour to such effect or that he heard it from the villagers generally without being able to name any one of them such evidence is not admissible in law. (*Ramlagan Ahir* v. *Emp. 1924 Pat. 500 25 Cr. L. J. 985*).

Evidence of general repute must be evidence given by respectable persons who are acquainted with the person on trial who live in the same neighbourhood and are aware of his reputation ; mere evidence of suspicion that the applicant committed certain acts is not generally of any value and especially so when given by persons responsible for the maintenance of order such as police officers. (*Nga Hein* v. *Emp. 8 Bur. L. T. 53 S. C. 16 Cr. L. J. 553*).

The evidence of accused's caste fellows and relatives and neighbours is the best sort of evidence available in connection with an enquiry into general repute. (*Gurbaksh* v. *Emp. 12 Cr. L. J. 542*).

To brush aside a large body of defence evidence in a proceeding under Sec. 110 merely on the ground that the witnesses were the caste fellows of the accused, that they came forward voluntarily without being summoned and that they were from villages four or more miles distant from that of the accused is not proper. (*Rahu* v. *Emp. 22 Cr. L. J. 115*).

Witnesses who voluntarily come forward whether as friends or associates of the accused to give them a good character must not be brushed aside unless they are discredited as regards their good faith and honesty just as witnesses in any other proceeding must be discredited before they are rejected by the tribunal. (*Aughoo* v. *Emp. 20 A. L. J. 881 S. C. 45 All. 109*).

Where the accused a Zeminder and money lender produced a large number of witnesses consisting of his fellow caste fellows and tenants to depose to his good character but the Magistrate disbelieved them solely on the ground that by virtue of his position he could produce a large number of witnesses it was held that the lower court had not approached the case from a proper point of view. (*Mehuban Sing* v. *Emp. 13 A. L. J. 1046*).

Where the accused is holding a responsible office, *e.g.*, that of chairman of the managing committee of the Municipality the evidence of general reputation must be evidence of reputation acquired since the appointment to the office. (*Emp.* v. *Bhau Savalran 16 Bomb. L. R. 943*).

Where the person proceeded against is able to produce witnesses on his behalf to speak of his good character the Court should not disbelieve the same unless there are substantial reasons for doing so. (*Amjad Ali* v. *Emp. 1924 Pat. 498*).

Positive evidence for the defence that the accused is a good man cannot be brushed aside on the ground that there is no proof of malice against the accused on the part of the prosecution (*Surendro Nath Manna* v. *Emp. 21 Cr. L. J. 170*).

Where in a proceeding under sec. 110 the prosecution witnesses for general repute say that they believe the accused to be a thief or a dacoit but in cross-examination they admit that their suspicion is the outcome of house searches and arrests by the police the accused is entitled to the benefit of the admission by the prosecution witnesses as to the origin of their suspicion (*Surendra Nath Manna* v. *Emp. 21 Cr. L. J. 170*).

Evidence that a certain person is of bad character is not sufficient to put a man on security under sec. 110 but there should be clear evidence on the record to show what exactly he had been doing and how he had been living. (*Muhammad Husein* v. *Crown 17 Cr. L. J. 142*).

Specific instances of crime in which the accused is suspected are not good evidence and do not fall within the meaning of "General repute" under sec. 117 because suspicion cannot take the place of proof that a man has committed an offence. (*Iabruddin* v. *Emp 20 Cr. L. J. 689*).

Evidence of association with bad characters is evidence of reputation but such reputation can only be based upon association with reputed bad characters. (*Emp.* v. *Nipal Shikary* 13 *C. W. N.* 318 *S. C.* 9 *C. L. J.* 439).

The mere relationship of some of the persons to others against whom sufficient grounds exist for requiring security is not corroboration of the approver's evidence as against them. (*Pochai Rai* v. *Emp.* 22 *Cr. L. J.* 486).

A list of crimes in which the accused was suspected by a police officer is inadmissible in evidence to establish the reputation of the accused. (*Babu Pershad* v. *Emp.* 13 *Cr. L. J.* 9).

Entries in Thanna Village Crime Note Book are not in themselves evidence in an enquiry for taking security for good behaviour. (*Pochai Rai* v. *Emp.* 22 *Cr. L. J.* 486).

In order to establish general reputation the evidence of an investigating police officer is inadmissible and irrelevant. (*Rameshwar Dosadh* v. *Emp.* 1 *Pat. L. T.* 32 *S. C.* 21 *Cr. L. J.* 321).

Inferences drawn by forest officials as to the persons who committed forest offences are not evidence of repute. The Court should test the sources of the information that led the officials to infer that the accused had anything to do with the offences. (*Kripa Sindhu Naik* v. *Emp.* 1918 *M. W. N.* 751).

Deviation from the dictum in Ishri Prossad's Case.

Where the person against whom proceedings under Sec. 110 are instituted is a well-known resident of the city his fellow citizens though not living in the immediate neighbourhood are competent witnesses to prove his general repute. (*Wahid Ali Khan* v. *Emp.* 11 *C. W. N.* 789). This is a deviation from the definition of general repute as given in *Rai Ishri Prossad* v. *Emp.* 21 *Cal.* 621. The same deviation is to be found in *Chintamon Sing* v. *King Emp.* 35 *Cal.* 243 *S. C.* 12 *C. W. N.* 299 where it has been held that in a case in which in consequence of a series of dacoities having taken place in certain villages a proceeding under Sec. 110 is instituted against a person for

being a robber by habit the evidence of general reputation coming in from the people of the villages where dacoities had taken place was certainly to be treated as evidence of general repute as required by Sec. 117 although the person did not live amidst those people.

In *Bechai* v. *Emperor 12 A. L. J. 937 S. C. 15 Cr. L. J. 705* it has been held that evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs or the personal opinion of the witnesses who are examined.

In *Kewal Kishore* v. *Emperor 26 Cr. L. J. 1283* it has been held that evidence of general repute means with reference to a man's character evidence as to his general chracter founded on the general opinion of the neighbourhood in which he lives. Evidence as to his general disposition founded on the opinion of the particular witnesses such opinion being the result of the witnesses' personal experience and observation will also be evidence as to his character. But although the evidence to be evidence of general repute must be evidence as to the general opinion of the neighbourhood in which the man lives the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally and it need not show that such opinion has been publicly expressed by the neighbours.

In *Nga Sin Po* v. *Emp. 2 Rang 686* it has been held that in security proceedings under sec. 110 the rule that a man's general reputation is the reputation which he bears in the place in which he lives among the inhabitants of that place may be correct in the majority of cases. The meaning of "place" must necessarily vary with the circumstances of the case. Where the accused person lives in one of an outlying collection of two or three houses evidence of his general repute could not be properly confined to the statements of the occupants of the other houses. The Court must satisfy itself that the evidence is true and properly appraise the evidence of witnesses living at considerable distance having no means of knowing the accused's reputation.

General repute, evidence of, in the case of a person registered under the Criminal Tribes Act.

Where proceedings under sec. 110 are taken against a person already registered under the Criminal Tribes Act, evidence of general repute which is bound to be affected in a large measure by the very fact of the person proceeded against being a member of a Criminal tribe should be, if at all, acted upon with great caution and scrutiny. The fact that the reputation of the accused continued as before registration did not show that further preventive action was necessary. (*Badu Mir* v. *King Emp. 31 C. W. N. 165*).

CHAPTER XVIII.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—

Admission of accused and the effect of previous conviction and acquittal.

Admission of accused.

Security for good behaviour should not be demanded from an accused who has not been shown to be a habitual thief by evidence on the record. The admission by an accused that he is of bad character and has been in jail is insufficient to warrant an order for security. (*King Emperor* v. *Kaka 3 Bomb. L. R. 629*).

Every order for bond must be made on evidence before the court and in a case under Sec. 107 also it has been held that no order can be made on the admission of the accused.

(See cases cited under Sec. 107 under heading Evidence).

The Madras High Court has not totally neglected admissions but it has held that a statement made by persons against whom proceedings are taken under Chapter VIII. of the Criminal Procedure Code who expressed willingness to give security should be recorded as nearly as possible in the words used by him and when a Magistrate fails to do so the proceedings are liable to be quashed. (*Subba Naicken Jnre 17 M. L. J. 438*).

In the Court of the Judicial Commissioner of Sind it has been held that even if the accused admits the allegations against him it is still necessary to make an enquiry into the truth of the information upon which action has been taken. (*Alladitt* v. *Emp. 26 Cr. L. J. 1041*).

Previous conviction for offences against property.

Previous convictions are not substantive evidences in a case under Sec. 110 although they may have an effect in deciding the duration of the bond. (*Emp.* v. *Nipal Shikary* 13 *C. W. N.* 318 *S. C.* 9 *C. L. J.* 439).

Under Sec. 511, in addition to any other mode provided by law for the time being in force a previous conviction or acquittal may be proved in any enquiry trial or other proceeding under the Code

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order

or

(*b*) in case of a conviction either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted or by production of the warrant of commitment under which the punishment was suffered. But in each of such cases evidence must be given as to the identity of the accused person with the person so convicted or acquitted.

Presidency Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions whenever it is required to prove a previous conviction against a man whether it be for the purpose of enhancement of punishment under Sec. 75 I. P. C. or in proceedings under Chapter VIII. of the Code of Criminal Procedure. Such previous conviction must be proved strictly and in accordance with law. Unless they are so proved no court whether it be that of a Presidency Magistrate or not can properly take such previous convictions into consideration against an accused person.

Where the previous convictions of an accused was sought to be proved by two witnesses one of whom was a certified expert in finger prints and who produced a register from the central bureau containing the thumb impression of the accused and his descriptive roll and a list of his previous convictions and the other

witness was a clerk in the prison at Bombay who produced an extract from the jail register showing previous convictions of a man who was certified therein to be the same man as the accused and certified copies of previous convictions of the same man. This witness was asked by the Magistrate to examine the accused and see if he bore the marks attributed to the convict in Bombay and he expressed his opinion that he did. It was held that the previous conviction was not properly proved. (*Emp.* v. *Shikh Abdul 43 Cal. 1128 S. C. 20 C. W. N. 725*).

Previous acquittal on charges of substantive offence, effect of.

A judgment of acquittal fully establishes the innocence of the accused and a criminal proceeding which ended in the acquittal of the accused cannot be relied upon by the Crown as evidence of bad character in a subsequent proceeding under Sec. 110 (*Rajendro Narayan Sing* v. *King Emp. 17 C. W. N. 238*). This proposition will find support from the judgments in *King* v. *Plummer* (*1902*) *2 K. B. 339 ; Emp.* v. *Nani Gopal 15 C. W. N. 593 ; Pulin Behary Das* v. *Emp. 16 C. W. N. 1105 S. C. 15 C. L. J. 577* in which the principle involved has been dealt with in cases of trials for substantive offences.

The Magistrate is not competent to question in his judgment in a case under Sec. 110 the decision of a competent Court passed in a trial for a substantive offence. (*Badlu* v. *Emp. 6 Oudh L. J. 327 S. C. 20 Cr. L. J. 727*).

As regards proceedings which ended in compromise no inference adverse to an accused ought to be drawn therefrom. (*Rajendro Narayan Sing* v. *Emp. 12 C. W. N. 238*).

A person was run in on a charge of dacoity and convicted but was acquitted in appeal. Immediately after his acquittal he was called upon to furnish security for his good behaviour as being a person of desperate and dangerous character. The evidence against him consisted of nothing but what had been put forward in the dacoity case and the statement of a witness to the effect that the accused was a person who associated with bad characters and also the statement of a circle inspector

whose knowledge of the accused was derived from what had transpired in the course of the investigation in the dacoity case. It was held that on the above evidence the accused could not be called upon to furnish security for his good behaviour. (*Gulab Chand* v. *Emp. 3 Oudh. L. J. 43 S. C. 17 Cr. L. J. 184*).

Courts must not make use of section 110 in order to secure the conviction of persons against whom a substantive charge has been made out but has broken down. No one could be bound down under that section merely because he had been suspected of particular crimes. (*Raja Ram* v. *Emp. 22 Cr. L. J. 273*).

Where a person had been arrested in connection with a dacoity case but the police considering the evilence against him to be of little value released him under Sec. 169 it was held that a Magistrate cannot in a subsequent proceeding for security for good behaviour bind him over on evidence going to show that he was concerned in that dacoity. (*Jhandu Sing* v. *Emp. 25 Cr. L. J. 45*).

Proceedings under Sec. 110 Cr. P. C. ought not to be instituted with a view to bind down persons on an indefinite charge after prosecutions against them on definite charges for substantive offences have failed. (*Alep Prammanik* v. *King Emp. 11 C. W. N. 413; Kismat Akanda* v. *King Emp. 11 C. W. N. 129*).

Alip Pramanick v. King Emp. 11 C. W. N. 413.

The facts of these cases clearly show the necessity of a strict adherence to the rule laid down above. In the first of these cases the petitioner Alep was arrested on a charge of dacoity on the 23rd of June 1905 and was kept in jail without any evidence being recorded against him or any steps taken to bring him to trial up to the 2nd of March 1906. The Sessions Judge on coming to know of this on a visit to the jail brought it to the notice of the District Magistrate and Alep was released. Shortly after his release he was brought up for trial on a charge under Sec. 412 I. P. C. and after a full enquiry was discharged by the Sub-Divisional Magistrate

of Tangail on the 11th May 1906. But on the very day he was discharged proceedings under Sec. 110 were instituted against him. The other petitioner Tamiz was arrested on a charge under Secs. 457 and 380 I. P. C. and was convicted on the 19th March 1906 under Sec. 380 I. P. C. by the Sub-Divisional Magistrate but on appeal the conviction and sentence were set aside and he was discharged on the 12th April 1906. On the 22nd May 1906 proceedings under Sec. 110 were taken against him. Since that time it appeared, the two proceedings against Alep and Tamiz were carried on jointly against them. At the conclusion of the enquiry the Sub-Divisional Magistrate ordered each of the two persons to execute a bond with two sureties to be of good behaviour for one year. In the course of the trial, beyond statements that the witnesses suspected or were under the impression that the two persons were thieves and dacoits no single fact was mentioned by any of them which could indicate that there was any sufficient reason for their suspicions or impressions.

It was pointed out by Brett and Gupta J. J. that the proceedings had in fact been taken to bind these persons down on an indefinite charge after the prosecution in the two cases had failed to prove any defenite charge aginst them and the proceedings under Sec. 110 should never have been taken.

Kismat Akanda v. King Emp. 11 C. W. N. 129.

In the second of these cases it appeared that a dacoity took place in the house of one Kaimulla Mondal on the 13th January 1905. The police sent up the petitioner and two others Afan and Sabetulla and submitted a "B" form report. The District Magistrate on the 4th March 1905 discharged all the three accused; subsequently on the confession of one Nava Mandal the petitioner and the two others named above were rearrested and placed on their trial before the Court of Session under Secs. 395, 457 I. P. C. the said Nava Mandal being examined as an approver and were convicted on the 10th August 1905. They appealed to the High Court and were acquitted. Four days after release of the petitioner Afan and

Sabetulla were arrested under Sec. 55 Cr. P. C. and proceedings were drawn up against them under Sec. 110 Cr. P. C. At the trial the approver Nava Mandal was examined as a witness for the prosecution. In the result all three of them were bound over under the section for a period of one year.

Mitra and Holmwood J. J. observed "The evidence against the petitioner consists of the evidence given in the dacoity case which was disbelieved by this Court and such evidence must therefore be excluded from consideration in the trial of the accused under Sec. 110. The rest of the evidence is extremely flimsy. We find that of the above witnesses who were examined most of them said the petitioner bore a good character, that there was nothing known against him and that they began to suspect him since the case of dacoity. On such evidence it is impossible to compel the petitioner to give sureties for good behaviour under Sec. 110. It would seem that failing to obtain a conviction in the dacoity case a proceeding in a different way was started in order to partially attain the same object."

Contrary view.

But the contrary view has been taken and the institution of proceedings under Sec. 110 subsequent to the failure of a prosecution for a substantive offence has been approved in *Raj Karan* v. *King Emp. 32 All. 55 S. C. 6 A. L. J. 961.* Here a charge of dacoity against certain persons failed for want of evidence but the District Magistrate on police information took proceedings against some of them under Sec. 110 Cr. P. C. and upon the whole evidence before him bound them over to be of good behaviour and it was held by Tudball J. that the order under the circumstances was a proper one.

In *Surendro Nath Manna* v. *Emp. 21 Cr. L. J. 170,* the police instituted proceedings against the accused under Sec. 110 though they failed to prove his guilt in regard to three specific charges of dacoity and it was held by the Calcutta High Court (Walmsley and Huda J. J.) that the Magistrate was not wrong in initiating proceedings under Sec. 110 but the evidence against the accused must be very satisfactory.

In *Shamlal* v. *King Emp.* 6 *A.I.J.* 487 it has been observed that when proceedings under Sec. 110 are started against a man soon after a discharge or acquittal on a charge of burglary of which he was suspected it is always necessary to make it clear that the proceedings were not taken as a means of punishing in an indirect way a man who (the police was convinced) was guilty.

CHAPTER XIX.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—

Provisional bond pending enquiry, commencement of period of bond and the Final order.

Provisional bond pending enquiry.

Provision has for the first time been made by the amending Act of 1923 for a bond being taken which is to be in force during the pendency of the enquiry. (Sub-Sec. 3 Sec. 117).

Pending the completion of the enquiry the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety may for reasons to be recorded in writing direct the person in respect of whom the order under Sec. 112 has been made to execute a bond with or without sureties for keeping the peace or maintaining good behaviour until the conclusion of the enquiry and may detain him in custody until such bond is executed or in default of execution until the enquiry is concluded

In an enquiry for good behaviour the provisional bond may be either for keeping the peace or for good behaviour but in an enquiry for keeping the peace the provisional bond can only be for keeping the peace.

The conditions of the provisional bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability shall not be more onerous than those specified in the preliminary order made under Sec. 112.

The final order.

If on enquiry it is not proved that it is necessary for maintaining good behaviour that the person in respect of whom the enquiry is made should execute a bond the Magistrate shall make an entry on the record to that effect and if such person is in custody only for the purposes of the enquiry shall release him or if such person is not in custody shall discharge him. (Sec. 119).

If necessity for the maintenance of good behaviour is proved the Magistrate shall direct the person in respect of whom the enquiry is made to execute a bond with sureties. (Sec. 118).

No person shall be ordered to give security of an amount larger than or for a period longer than that specified in the preliminary order recorded under section 112. (Sec. 118).

The amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. When the person in respect of whom the enquiry is made is a minor the bond shall be executed only by his sureties. (Sec. 118).

The person ordered to furnish security for good behaviour cannot be permitted to deposit a sum of money or Government premisory-notes in lieu of executing the bond called for (section 513 not permitting this in the case of a bond for good behaviour).

It must be remembered that though Cl. 5 of section 117 permits the Magistrate to hold a joint enquiry against several suspects associated together in the matter under enquiry it is incumbent on him to consider the case of each suspect individually on its own merits and to come to a separate finding in respect of each of them.

The person called upon to furnish security must execute his own bond which cannot be dispensed with in any case except in the case of a minor and the order confined to furnishing sureties only. (*Emp.* v. *Udham* 1 *A. L. J.* 593 *S. C.* 1904 *A. W. N.* 230 *S. C.* 27 *All.* 262).

The bond is one bond for one amount and is discharged or forfeited by the payment of the amount due by the principal or the surety. In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties individually or collectively. (*Harnam* v. *Emp. 5 Lahore 448*).

The amount must not be excessive. (*Q.* v. *Reza Ali 23 All. 80*).

In condemning prohibitive sureties Pontifex J. observed in *Emp.* v. *Kala Chand 6 Cal. 14*. "My own experience in Calcutta has shown me that respectable people in Calcutta who have to provide sureties upon grant of letters of administration have to pay heavy sums to the sureties and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for their good behaviour so that it comes to this that the requirement of two sureties to the amount of Rs. 500/- each for each of the defendants will in effect be inflicting a heavy pecuniary fine upon them in a case only of suspicion and reputation."

The character and reputation of a suspect are not the sole consideration on which the amount of security should be determined and fixed. The amount should not be excessive or prohibitive and it should be fixed after considering the station in life of the accused. (*Piralal Arab* v. *Emp. 6 S. L. R. 10 S. C. 12 Cr. L. J. 110*).

The policy of the law is not to fill the jails with bad persons but to make them respect the law and the number of sureties demanded must not be unreasonable. (*Mahala* v. *Crown 6 P. R. Cr. 1914 S. C. 16 Cr. L. J. 337*).

Sec. 123 shows that security for good behaviour should ordinarily be demanded for one year except in very bad cases in which the period may extend up to three years but in such cases whenever there is no compliance with the order it is the duty of the Magistrate to direct the detention of the accused in prison till the orders of the Sessions Judge or the High Court as the case may be. (*Shakoor Sait Inre 30 I. C. 438*).

It is a serious mistake in the bond to make each of the

sureties liable for the full penalty of the bond. (*Emp.* v. *Ngapo Sin 4 Bur. L. T. 270 S. C. 13 Cr. L. J. 62*).

In *Umbica Prossad In the matter of, 1 C. L. R. 268,* the petitioner was the son of a rich Zemindar and the Magistrate called upon him to furnish security for good behaviour for Rs. 20,000/- in four sureties of Rs. 5,000/-. The whole order was set aside by the High Court.

In *Juggat Chandra Chuckuburty In the matter of, 2 Cal. 110* in a case of apprehended breach of the peace the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000/- or upwards. The High Court quashed the order holding that it was altogether unreasonable.

Commencement of period of Bond.

If any person in respect of whom an order requiring security is made is at the time when such order is made sentenced to or undergoing a sentence of imprisonment the period for which security is required shall commence on the expiration of such sentence. In other cases such period shall commence on the date of such order unless the Magistrate for sufficient reasons fixes a later date. (Sec. 120).

Where an order was made that the period of imprisonment under an expired sentence for an offence which was confirmed on appeal should run after the imprisonment in default of finding the security ordered to be furnished for good behaviour which appellant was then undergoing it was held that the order was illegal. The period of further detention in jail must be deemed to have been first in execution of the unexpired sentence for the offence. (*Emp.* v. *Jhabdey 22 Cr. L. J. 95*).

Final order a Judgment.

Under Sub-sec. 6 of sec. 367 introduced for the first time in the Code in 1923 an order under Sec. 118 is a judgment so that such an order must contain the point or points for determination the decisions thereon and the reasons for the decision and must otherwise conform to the provisions of Sec. 367.

CHAPTER XX.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED SURETY.

Surety.

Power to reject Sureties.

122. (1) *A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond :*

Provided that before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) *Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.*

(3) *If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing :*

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Enquiry on oath.

The section 122 speaks of a Magistrate only. When the bond called for is for more than one year a reference to a higher court is necessary which in the mofussil is the Court of Session and in the Presidency town the High Court and although the order of the higher court is the operative order any surety offered in pursuance of such order will be dealt with by the Magistrate who made the order in the first instance. Sureties offered in pursuance of orders made by higher courts in appeal will also be dealt with by the Magistrate whose order was appealed against. So far as Secs. 107, 108, 109, are concerned there cannot be any occasion for a reference to a higher court which may become necessary only in cases under Secs. 106 and 110 and as shown above in such cases it is the Magistrate who made the order originally who will deal with any surety offered in pursuance of the order of the higher court. Before the amendment of 1923 the law as embodied in Sec. 122, as it then stood, was that "a Magistrate may refuse to accept any surety offered under this chapter (*i.e.*, Chap. VIII), on the ground that for reasons to be recorded by the Magistrate such surety is an unfit person."

The question arose whether the Magistrate was bound to hold an enquiry before making the order of rejection and whether the fitness of the surety was to be adjudged from the point of view of pecuniary sufficiency or ability to influence and control the movements and the mode of life of the person for whose good behaviour security is taken.

In *Jalil In the matter of, 13 C. W. N. 80 S. C. 8 C. L. J. 243* Geidt J. observed that the unfitness of a surety for good behaviour referred to in Sec. 122 though it may not exclude the idea of pecuniary unfitness is more concerned with the idea of moral unfitness. In the same case Woodroffe J. pointed out that

the legislature not having particularised any kind of unfitness the matter was left to the discretion of the Magistrate subject to the High Court's power of declaring in each case, according to its own circumstances, whether the order passed by the Magistrate was reasonable or not.

The law as it has now been enacted in the new section 122 substituted in place of the old one makes it clear that the Magistrate, before refusing to accept a surety, or rejecting a surety previously accepted shall either himself hold an enquiry on oath into the fitness of the surety or cause such enquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

If the security is tendered to the officer in charge of the jail he shall under Sub-sec. 4 of Sec. 123 forthwith refer the matter to the Court or Magistrate who made the order and shall await the orders of such Court or Magistrate. To whom is the reference to be made where under Sec. 123 an order has been made by a higher court? The words "Court or Magistrate" have been used in view of Sec. 106 under which the High Court or Court of Session may make an order for security and are not intended to refer to the court of reference under Sec. 123. In all cases in which there is a reference to a higher court under Sec. 123 wherever security is tendered to the officer in charge of the jail he is to refer the matter to the Magistrate who originally made the order. The reference under Sec. 4 is to be made to the Court which made the order originally, it may be the Court of Session or the High Court acting under Sec. 106 or Magistrates in all other cases. On a reference by the officer in charge of the jail the Magistrate is to decide whether the security offered is to be accepted or not and he may proceed under Sec. 122.

The necessity of an enquiry which the legislature has now made imperative will appear from the case of *Munshi Sing* v. *Emp. 18 A. L. J. 324* in which the Magistrate acting upon a police report that a person tendered as surety had once been challenged in a theft case and without taking any evidence rejected the surety as being an unreliable person. It was held by Knox J. that it did not follow that a person who had once

been challenged for theft was not a reliable person and that it was not for the surety to prove that he was a good character but for the Magistrate if he doubts it to decide upon tangible evidence.

The enquiry must be on oath. The substance of the evidence adduced in the enquiry must be recorded. The desirability of holding the enquiry on evidence was laid down by the courts repeatedly before the amendment in 1923 and it was held that an enquiry under Sec. 122 is a judicial proceeding and a Magistrate cannot import his personal knowledge into a case without giving evidence and refuse to accept a surety on the ground of personal knowledge. (*Peru Abdulla* v. *Emp.* 7 *S. L. R.* 94 *S. C.* 15 *Cr. L. J.* 378).

In *Bhawani Sing* v. *Emp.* 12 *A. L. J.* 1004 *S. C.* 16 *Cr. L. J.* 54 it was held that the Magistrate must hold an independent enquiry and exercise his discretion and when a Magistrate acting on a police report refuses to accept a certain person as surety his order is bad on account of the absence of enquiry.

Fitness of surety.

So far as the fitness of the surety is concerned the ground on which the Magistrate may refuse to accept any surety offered or may reject any surety previously accepted by him or his predecessor is that the surety in question is an unfit person *for the purposes of the bond.*

The legislature has not particularised any kind of unfitness but has left the matter to the descretion of the Magistrate, subject to the High Court's power of declaring in each case, according to its own circumstances, whether the order passed by the Magistrate is reasonable or not. But it has given one very important direction which must always be borne in mind that the only ground on which a surety may be rejected is that he is an unfit person for the purposes of the bond.

The purpose of the bond is to compel the person from whom the security is taken to keep the peace or to be of good behaviour for the stipulated period. Sec. 121 lays down that in the case of good behaviour the commission or attempt to

commit or the abetment of the commission of any offence punishable with imprisonment, whenever it may be committed, is a breach of the bond. The section is silent as to what should be a breach in the case of bonds for keeping the peace. In the absence of any definition of breach in such cases it must be taken that a breach of a bond for keeping the peace occurs when breach of the peace occurs.

Now having regard to the purposes of the two kinds of bonds the surety is reasonably expected to be able to prevent a breach of the peace by the person for whom he stands surety or the commission or the attempt to commit or the abetting of any offence punishable with imprisonment. It is clear therefore that mere pecuniary sufficiency is not enough to make a surety a fit person for the purpose of a bond under Chap. VIII, on the other hand, unfitness for the purpose of the bond includes pecuniary unfitness having regard to the amount required to be secured.

The grounds for refusing to accept a surety or rejecting one previously accepted must be recorded. (Cl. 3, Sec. 122).

Cases decided before the amendment.

The earlier rulings on the question of unfitness of sureties may still be referred to as a source of help in deciding whether a surety is fit or not for the purpose of the bond

Sureties improperly rejected.

Relationship of the surety to the accused is not a disqualification (*In re Abdul Khan 10 C. W. N. 1027*) ; on the other hand it is a most useful qualification in the person tendered as surety (*Emp.* v. *Shib Sing 25 A. 131 S. C. 1902 A. W. N. 197*). As pointed out by Heaton and Shah J. J. relations and castemen are the persons most likely to exercise control over the persons for whom they stand as sureties and sureties ought not to be rejected on the ground of relationship alone (*Emp.* v. *Jiva Nath 16 Bomb. L. R. 138*) or on the ground that besides being a relation the surety offered was named as a defence witness. (*Muhammad Wari* v. *Emp. 22 Cr. L. J. 22*).

Unnecessary difficulties should not be thrown in the way of people required to give security. (*Rahmatulla* v. *Emp.* 22 *Cr. L. J.* 305).

The Magistrate in ordering sureties has no jurisdiction to put such restriction upon the nature of the sureties as to direct that they should be local. The nature of the sureties is a matter which must be decided subsequently if objection is taken to the sureties by the police authorities. (*Islam Khan* v. *Emp.* 15 *Cr. L. J.* 254).

An order directing an accused person to produce sureties residing within certain limits is illegal. (*Raghunandan Prossad* v. *Emp.* 20 *A. L. J.* 520).

Although it is reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they are willing to stand sureties yet the rejection by the Magistrate of sureties on the mere ground that they live at a distance from the village of the persons required to furnish security for good behaviour is not a proper order.

It is not reasonable to reject a surety on the ground of being neighbours or of being of the same caste as accused persons if they come within the terms of the order and are not personally unfit. The reluctance of the surety or his inability to influence the accused are not good ground for rejecting sureties. It is enough if he is in a position to observe the accused and of a standing as not to hesitate to apply for cancellation if there is risk of forfeiture. (*Muhammad Ibrahim* v. *Brown* 8 *S. L. R.* 173 *S. C.* 16 *Cr. L. J.* 100).

The mere fact that a person ordered to produce surities gives as security two persons who are residents of a different police district and who helped him in his defence will not make them improper as sureties and the Magistrate should not refuse to accept them. (*Govardhan* v. *Emp.* 16 *A. L. J.* 263).

In a case where the Magistrate rejected certain sureties on the ground that they did not live within a radius of five miles of the place where the accused person lived it was held that

the order was bad and there was no valid ground for rejecting the sureties. (*Hasinuddin* v. *Emp.* 10 *A. L. J.* 354).

Sureties should not be rejected merely on the ground that they lived at a distance from the accused. (*Emp.* v. *Pancha* 23 *Cr. L. J.* 425 ; *Bhawan Suhai* v. *King Emp.* 7 *A. L. J.* 293 ; *Rahamatulla v. Emp.* 22 *Cr. L. J.* 395) and were on friendly terms with the accused. (*Bhawan Sahi* v. *King Emp.* 7 *A. L. J.* 293).

It is quite unnecessary, not to say improper, to demand that the surety should be resident of any particular place. It is enough if the Magistrate is satisfied that the surety can exercise a proper influence over the person bound over. (*Sheikh Zikri* v. *Emp.* 8 *A. L. J.* 785).

It has also been observed that the object of requiring security is not to obtain money for the crown by the forfeiture of recognizances but to assure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as to make it unlikely that they should exercise any control over the man for whom they are willing to stand surety. If the sureties undertake to keep the accused within the area of their observation or to adopt other suitable measures for securing the supervision and control, indeed to keep him in good behaviour, there can be no inherent objection to their being accepted as sufficient (*Emp.* v. *Ramweshwar Tewari* 10 *Oudh L. J.* 299).

An order requiring sureties to be respectable holders of landed property is an improper order framed with the express intention of preventing the applicant from furnishing security. Magistrates should see that sureties are such persons as are in a position to influence the applicant and are likely to be able to restrain him. (*Nga Hlim* v. *Emp.* 8 *Bur. L. T.* 53).

But the view has also been taken that an order requiring the accused to find sureties who shall be neighbouring Zamindars paying a certain amount is valid. (*Jumo* v. *Crown* 8 *S. L. R.* 229; *Allahabad* v. *Crown* 17 *Sind L. R.* 160).

The fact that a proposed surety has on one occasion offended against the law and been punished for an offence under the Penal Code does not in itself render such person forever afterwards unfit to be surety for a party who is required to give security for good behaviour. (*Emp.* v. *Raghu Nath Sing 26 A. 189*) especially when in fact he is a substantial person. (*Budhu Ahir* v. *Emp. 22 Cr. L. J. 483*).

Where a Magistrate refused to accept sureties tendered by a person bound over under Sec. 110 upon the following grounds :—

(*i*) that three out of four sureties are not residents of the village where the defendants live.

(*ii*) that all of them are reported to be of bad character

(*iii*) that three of them are relatives of a person who was suspected of receiving stolen property, it was held that the first second and fourth grounds were not sufficient but the third ground might be. (*Suresh Ch. Basu* v. *Emp. 3 Cal. L. J. 575*).

Where a Magistrate refused to accept a surety on the ground that he lived four miles away from the accused and that he looked a boy and inexperienced and would consequently be too weak to take proper care of the accused it was held that these were not really good grounds for rejecting the surety as unfit. (*King Emp.* v. *Panchu 24 Oudh Cases 292*).

It is not open to a Magistrate to reject sureties as unfit because they do not comply with certain arbitrary conditions which was not included in the order under Sec. 112. In the case of a notorious thief the sureties cannot be asked to show their good faith and influence over him by first producing in Court his father who was also absconding. (*Emp.* v. *Manu Walad Ismail 25 Cr. L. J. 1226*).

Where a Magistrate refused to accept a certain pleader as a surety for a person, a member of a large gang of swindlers, on the ground of the surety's inability to control the accused it was held that the order was in the circumstances of the case reasonable and proper. (*Abdul Kerim* v. *Emp. 44 C. 737 S. C. 21 C. W. N. 925*). Where the sureties tendered were the brothers of the accused and were rejected on the ground that

they were not in a position to control him sufficiently to ensure his good behaviour in future, the order was held to be good. (*Emp.* v. *Asiruddi Mandal 41 Cal. 764*).

Liability of Surety.

A person who stands surety for another on the latter having been suspected as a thief and notorious receiver of stolen property cannot be compelled to undergo liability for any conceivable form of offence committed by the person for whom he stood surety, *e.g.*, on the conviction of the person on a serious charge of violence under Sec. 326 I. P. C.

The man who stands surety for another should always be treated in a considerate manner and it is contrary to principles of justice that he should be liable for a sudden act of violence especially when he himself belongs to another village and has no opportunity of controlling the every day life of the offender. (*Udham Sing* v. *Emp. 14 Cr. L. J. 575*).

Persons who stand surety undertake liability for such good conduct only on the part of the persons for whom they stand surety as is indicated by the circumstances under which the security was demanded.

A was required to give security for being suspected as a thief and notorious receiver of stolen property. *B* a resident of another village was accepted as *A's* surety. *A* was subsequently convicted on a serious charge of violence under Sec. 326 I. P. C. It was held that *B* should not be held liable for *A's* sudden act of violence and no part of *B's* security should be confiscated. (*Udham Sing* v. *Emp. 14 Cr. L. J. 575*).

On the death of the person bound down the surety is discharged. (*Narashingha Deb Chatterji* v. *Emp. 16 C. W. N. 550*).

Application by surety for discharge.

Any surety may at any time apply to a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class to cancel his surety bond. Such Magistrate need not be the Magistrate of the Court which made

the order for the bond. On such application being made the Magistrate shall issue his summons or warrant requiring the person for whom the surety is bound to appear or to be brought before him and on his appearance or production the bond shall be cancelled and the Magistrate shall order such person to give for the unexpired portion of the terms of such bond fresh security of the same description as the original security. (Secs. 126, 126A).

Every such order shall for the purposes of Secs. 121, 122, 123, 124 be deemed to be an order made under Sec. 118. The Magistrate may not be the Magistrate who made the order for security originally. Evidently it is meant that the Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class must be one in whose jurisdiction the person bound down is ; Sub-sec. 2 of Sec. 126 points to this.

Appeal.

Under Sec. 406A a provision introduced for the first time in the Code by the amending Act of 1923 any person aggrieved by an order refusing to accept or rejecting a surety under Sec. 122, may appeal against such order if made by a Presidency Magistrate to the High Court, if made by the District Magistrate to the Court of Session or if made by a Magistrate other than the District Magistrate to the District Magistrate. Who are the persons who can have the benefit of the right of appeal given by Sec. 406A as persons aggrieved by an order refusing to accept or rejecting a surety. Does the surety himself who is not accepted come within the category of the person aggrieved ?

If a person on being approached consents to stand as surety for another who has been called upon to furnish security and if he is rejected by the Court on the ground that he is a unfit person the order is surely one which is not in favour of the surety and he may be said to be aggrieved by the order as much as the person for whom he was willing to stand as surety. If that is so then under Sec. 406A an appeal lies at his instance as much as at the instance of the person for whom he was willing to stand surety.

CHAPTER XXI.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED.

BREACH OF BOND.

Breach of Bond.

In the case of a bond for good behaviour the commission or attempt to commit or the abetment of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. (Sec. 121).

Where a person has given security for good behaviour and is subsequently convicted of criminal trespass the amount of his forfeited bond may be exacted but he cannot be forthwith committed to prison for the unexpired portion of the term for which security was taken. (*King Emp.* v. *Jagdeo Sing 28A 629 S. C. 1906 A. W. N. 142*).

It is not the intention of the legislature that a person against whom an order has been made under Sec. 110 should be recommitted to jail upon the forfeiture of his bond. If it is desired to proceed further against him it must be by fresh proceedings. (*Emp.* v. *Ignatia Reis 14 Cr L. J. 430*).

Neither the principal nor the surety can be made liable for an offence which occurred before the security was given. The period for which a person is bound over to be of good behaviour begins from the date on which he was bound over. A bond for good behaviour is clearly liable to forfeiture provided that evidence is produced to shew either that the person bound down committed an offence in British India prior to absconding out of British India into independent territory and during the currency of the bond or that during the currency of the same he committed an offence during his outlawry punishable with imprisonment. (*Mansur* v. *Empress 24 Cr. L. J. 588*).

Under Sec 121 it is immaterial where the offence is committed, commission of an offence punishable with imprisonment anywhere is breach of the bond. The bond given under Sec. 118 is for being of good behaviour in all places where the accused may happen to be and for every portion of the period stipulated in the bond.

Conviction if absolutely necessary to prove breach of bond.

A very important question arises whether the commission of the offence is to be proved by the conviction for the offence or it may be proved in any other way and there may be breach of a bond on the ground of commission of an offence punishable with imprisonment though there has been no conviction.

It has been held that the commission of the offence can be established by any satisfactory proof even though there has been no conviction. (*Mansur* v. *Emp. 24 Cr. L. J. 588*).

On the plain words of the section this view is quite warranted. What is the position when there has been a trial for the alleged commission of an offence and an acquittal?

Acquittal and breach of bond.

Clearly in such a case there is no breach of a bond for an acquittal is an acquittal for all purposes and the judgment of acquittal passed by a competent Court is conclusive evidence of the fact that the offence alleged to have been committed by the accused was not committed by him. The commission of the offence may be a fact but that is neither here nor there, it must be commission by the accused and when he was put on his trial for such commission but acquitted it is established for all purposes that he did not commit the offence which formed the subject matter of trial and the commission of that offence cannot be alleged against him for any purpose.

So that when there has been an acquittal it is not open to establish that the accused committed the offence in question although for some reason or other he could not be convicted. The acquittal might be on the ground that the evidence conclusively established that the accused did not commit the

offence or it might be that it was doubtful whether he committed it or not and he was given the benefit of the doubt and acquitted. The law makes no distinction between the two classes of acquittals.

The procedure to be followed on forfeiture of a bond is laid down in Chap. XLII of the Code—Sec. 514, 514-A, 514-B.

CHAPTER XXII.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—

Imprisonment for failure to give security.

Imprisonment for failure to give security.

If the security required is not furnished the person ordered to furnish the security shall be committed to prison or if he is already in jail shall be detained in prison until the period of the bond expires or the security is furnished (Cl. 1 Sec. 123).

Such imprisonment in cases of bonds for good behaviour under Secs. 109 and 110 is to be rigorous or simple as the Court may direct. In cases under Sec. 108 such imprisonment is to be simple. (Sec. 123 Cl. 6).

After keeping the law on the subject intact for a long time the legislature in amending the Code in 1923 laid down in Cl. 6 of Sec. 123 that in cases under Secs. 108, 109, imprisonment for failure to give security shall be simple and in cases under Sec. 110 shall be rigorous or simple in the discretion of the Court. This has again been altered and by Act X of 1926 Cl. 6 of Sec. 123 has been amended so as to make imprisonment in cases under Sec. 108 simple and in cases under Secs. 109, 110, rigorous or simple in the discretion of the Court.

As pointed out by MacPherson and Birch J.J. in *Umbica Prossad In the matter of, 1 C. L. R. 268* it is true that the imprisonment may be rigorous or not as the Magistrate may in each case direct. But where in the case of a man who has never been convicted of any offence the Magistrate orders that security should be given of a description which it must

necessarily be difficult to find and directs that in default of giving the security the imprisonment shall be rigorous such an exercise of the discretion is wholly unreasonable and bad

Such imprisonment can never be solitary confinement. (*Kundan* v. *Emp. 39 A. 495 S. C. 12 A. I. J. 823*).

Under Cl. 1 of Sec. 123 on failure to furnish the security called for the person against whom the order has been made shall be committed to prison or if he is already in prison shall be "detained in prison."

When a person who is fourteen years of age or upwards but under the age of sixteen years has been ordered to give security and has failed to do so the Court which made the order may order such person to be sent to a reformatory school—Sec. 22 Sub-sec. 5 Bengal Children Act II of 1922. (Applicable at present to Calcutta and Howrah).

Under Sec. 21 of the said Act no person under the age of fourteen years or of the age of fourteen or upwards but under the age of sixteen years shall be committed to prison in default of furnishing security

Under Cl. (2) of Sec. 123 when the period of the bond called for exceeds one year the matter has to be referred to the Sessions Judge (or the High Court in the case of an order by a Presidency Magistrate) and pending orders on the reference the person called upon to furnish security shall be detained in prison.

The words "committed to prison" "detained in prison" were differently interpreted from the point of view whether a person committed to prison under Sec. 123 in default of furnishing security is undergoing a sentence of imprisonment within the meaning of Sec. 397 which deals with the carrying into execution of a sentence on an offender already sentenced for another offence. To put an end to this conflict of views the legislature has now amended Sec. 397 by adding the following proviso—Where a person who has been sentenced to imprisonment by an order under Sec. 123 in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order the latter sentence shall commence immediately.

Under Sec. 120 (1) read with Sec 123 (1) of the Code a sentence of imprisonment under Sec. 118 cannot be made to run concurrently with some other sentence which the accused is already undergoing. (*Chinna Swamy Inre 16 Cr. L. J. 272*).

Where a person who has been sentenced to imprisonment in default of furnishing security is whilst undergoing such sentence sentenced to imprisonment for an offence committed prior to the making of such order the latter sentence will commence immediately. (Proviso 2 Sec. 397).

If the security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Magistrate who made the order and shall await the orders of the Magistrate (Cl. (4) Sec. 123).

CHAPTER XXIII.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—

Special power of District and Chief Presidency Magistrates.

Power of District Magistrate and Chief Presidency Magistrate to release persons imprisoned for failing to give security and to reduce amount and period of bond. (Sec. 124).

Where the security called for has not been furnished and the person proceeded against has been imprisoned the District Magistrate or the Chief Presidency Magistrate may order such person to be discharged whenever he is of opinion that this may be done without hazard to the community ; such Magistrate may also reduce the amount of the security or the number of sureties or the time for which security has been required. The ground on which the discharge may be ordered is that it may be done without hazard to the community or to any other person which is really the justification for taking security for keeping the peace or for good behaviour.

A change has been made by the amending Act of 1923. Formerly the District Magistrate or the Chief Presidency Magistrate if of opinion that such persons might be released without hazard to the community or to any other person might order him to be discharged if the order for security had been made by such Magistrate himself or his predecessor in office or some subordinate Magistrate and when the security had been ordered by the Court of Session or High Court the District Magistrate or Chief Presidency Magistrate was to make a report to the superior court which might if it thought fit order the discharge.

Now in all cases the order for release may be made by the District Magistrate or the Chief Presidency Magistrate as the

case may be. It makes no difference even if the order was made by a superior court. The scope of Sec. 124 is thus wider than that of Sec. 125 the application of which is limited to cases in which the order for security has been made by a court in the district not superior to the court proposing to set it aside.

Before the amendment in 1923 Sec. 124 included within its scope only orders passed by the District Magistrate or the Chief Presidency Magistrate himself or by his predecessor in office or by a Magistrate subordinate to him whereas Sec. 125 dealt with orders made by a Magistrate not superior to the District or Chief Presidency Magistrate, in other words it included orders made by Additional District Magistrates. In amending the Act in 1923 the legislature has left Sec. 125 intact but has enlarged the scope of Sec. 124 so as to make it applicable in all cases in which a person has been imprisoned for failure to furnish security whether for keeping the peace or for good behaviour even if the order for security was made by a higher court. The further question arises how far a District Magistrate or a Chief Presidency Magistrate is limited to exercising his jurisdiction under Sec. 124 within the local limits of his jurisdiction. The effect of the omission of the words "whether by the order of such Magistrate or that of his predecessor in office" or of some subordinate Magistrate is not only to remove the bar to the exercise of jurisdiction in cases of security demanded by a higher court but also to empower the District Magistrate and the Chief Presidency Magistrate to exercise the power conferred on him in all cases of imprisonment for failure to give security under Chap. VIII of the Code. There is nothing in the section, as it has now been altered, to show that a District Magistrate or a Chief Presidency Magistrate cannot exercise his powers in respect of a person imprisoned in a place outside his district but this is opposed to common sense. The reasonable view would be to hold that such Magistrate can exercise the powers in question in respect of a person undergoing imprisonment in a jail within the local limits of his jurisdiction. The power of the District Magistrate or the Chief Presidency Magistrate to reduce the amount of the security or the number of sureties or the time for which security has been required has however been

as before confined to cases where the order has not been made by a Court not superior to his own.

According to the provisos (Cls. 3, 4, 5, 6) added in Sec. 124 by the amending Act of 1923 the discharge may be unconditional or clogged with conditions. The conditions must however be accepted by the person discharged. The local Government may prescribe the conditions upon which a conditional discharge may be made. If any condition upon which any such person has been discharged is in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor not fulfilled he may cancel the same. Thereupon the person discharged may be arrested by any police officer without warrant and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate who may remand him to prison to undergo the unexpired portion of the bond unless security in terms of the original order is furnished for such period.

A person so remanded to prison shall be released at any time on giving security in accordance with the terms of the original order for the unexpired portion of the bond to the Court or Magistrate by whom such order was made or to its or his successor.

The provisions contained in Sec. 122 as to rejecting or accepting sureties are applicable to the sureties so offered. Under Sec. 530 Cl. (c) if a Magistrate not empowered by law in this behalf discharges a person lawfully bound to be of good behaviour his proceedings shall be void.

Under Sec. 123 Cl. (4) in case of failure to furnish security at the outset if the security is tendered to the officer in charge of the jail he shall forthwith refer the matter to the Court or Magistrate who made the order and shall await the orders of such Court or Magistrate. But here there is no such provison about security being tendered to the officer in charge of the jail.

Power of District Magistrate and Chief Presidency Magistrate to cancel bond of any kind. (Sec. 125).

The Chief Presidency Magistrate or District Magistrate may, at any time for sufficient reasons to be recorded in writing,

cancel any bond for keeping the peace or for good behaviour executed by order of any Court in his district not superior to his Court.

Magistrate cancelling a bond for good behaviour though not empowered to do so.

Under Cl. (*f*) of Sec. 530 if a Magistrate not empowered by law in this behalf cancels a bond to keep the peace his proceedings shall be void.

The only reference to unlawful interference in cases of security for good behaviour is to be found in Cl. (*e*) which speaks of discharging a person lawfully bound to be of good behaviour. This cannot be taken to include cancellation of a bond for good behaviour under Sec. 125 regard being had to the language of Cl (*b*) of Sec. 530, Sec. 124, Sec. 125. Clauses (*a*) and (*b*) of Sec. 530 must be taken to refer to the provisions of Sec. 124 and Sec. 125 respectively. The concluding words of Sec. 124 which describes the action that may be taken under the section are "he may order such person to be discharged" and the material portion of Sec. 125 is that the Magistrate named may cancel any bond for keeping the peace or for good behaviour. The result is that an order of discharge under Sec. 124 in a case of security for good behaviour and that of cancellation of a bond under Sec. 125 in a case of security for keeping the peace if made by a Magistrate not empowered by law in this behalf is void but not so an order of discharge under Sec. 124 in a case of security for keeping the peace and that of cancellation of a bond in a case of security for being of good behaviour. A historical survey shows how the anomaly has crept into being. It is due to the development of the law which we now find in Sec. 125 without the necessary corresponding change being made in Sec. 530.

In the Code of 1872 in Sec. 34 which was the corresponding section clause 11 dealt with discharging a recognizance to keep the peace and Cl. 13 with discharging a person lawfully bound to be of good behaviour.

In the Code of 1882 Sec. 125 was enacted in terms empowering the District Magistrate to cancel a bond for keeping the

peace and in the place of Cl. 11 of Sec. 34 we find in the corresponding section (530) clause (*f*)—"cancels a bond to keep the peace." The other clause 13 was substituted by clause (*e*) in identical terms:—"discharges a person lawfully bound to be of good behaviour." In 1898 Sec. 125 was enlarged in scope so as to empower the District Magistrate or the Chief Presidency Magistrate to cancel a bond for keeping the peace as also one for good behaviour but Sec. 530 was not touched so that we find in clauses (*e*) and (*f*) of Sec. 530—"discharges a person lawfully bound to be of good behaviour and cancels a bond to keep the peace."

It is opposed to common sense that the cancellation of a bond for keeping the peace should be void on a particular ground but that of a bond for good behaviour should not be so on the identical ground. An order for security for good behaviour is a graver sentence so to say than an order for security to keep the peace and strict compliance with the law is more to be enforced in the former than in the latter class of cases.

In his district.

Under Cl. (4) of Sec. 7 every Presidency town shall for the purposes of the Code of Criminal Procedure be deemed to be a district. The Chief Presidency Magistrate is to exercise the jurisdiction conferred under the section in the Presidency town of which he is the Chief Magistrate and the District Magistrate in the District of which he is the District Magistrate.

The order that can be interfered with under the section is one made by a Court not superior to the Court of the Chief Presidency or District Magistrate who proposes to set aside the order. The Magistrate whose order is to be set aside must be one who exercises jurisdiction in the district or the Presidency town over which the Chief Presidency Magistrate or the District Magistrate in question exercises jurisdiction.

Amendments affecting Sec. 125.

Sec. 125 has not been altered in any way by the amending Act of 1923 but two things are be considered in this connection,

viz., the amendment of Sec. 10 of the Code by the addition of Sub-sec. (3) and the amendment of Sec. 18 by the addition of Sub-sec. (4).

Under Sub-sec. 3 of Sec. 10 Additional District Magistrates are subordinate to the District Magistrate for the purposes of Sec. 192 Sub-sec. 1 (transfer of case by the District Magistrate from his own file to that of a Subordinate Magistrate), Sec. 407 Sub-sec. 2 (disposal of appeal preferred to the District Magistrate by a subordinate Magistrate deputed by him), Sec. 528 Sub-secs. 2 and 3 (transfer of case by District Magistrate from the file of a subordinate Magistrate to his own file or to that of some other subordinate Magistrate).

The effect of the addition of Sub-sec. 3 to Sec. 10 must be taken to be that the Additional District Magistrate shall be subordinate to the District Magistrate for the purposes mentioned therein and for those purposes only.

This does not however alter the position of the District Magistrate with reference to an Additional District Magistrate so far as Sec. 125 is concerned for the Additional District Magistrate is not for any purposes superior to the District Magistrate who can therefore set aside under Sec. 125 an order for security made by the former.

Cl. 4 of Sec. 18 creates Additional Chief Presidency Magistrates. No provision has however been made similar to Sub-sec. 3 of Sec. 10 making the Additional Chief Presidency Magistrate subordinate to the Chief Presidency Magistrate for any purpose not even for those for which the Additional District Magistrate has been made subordinate to the District Magistrate.

The status of an Additional Chief Presidency Magistrate is therefore the same as that of a Chief Presidency Magistrate but that does not make him in any sense superior to the District Magistrate who is therefore competent to set aside under Sec. 125 any order for security made by the former.

Scope of Sec. 125.

Sec. 125 excludes bonds executed by order of a Court superior to the Court of the District Magistrate or the Chief Presidency Magistrate The affirmance of an order for security

by the Sessions Judge or the High Court in appeal or the latter in revision does not make the bond executed in the case a bond executed by order of a superior Court. The bond is one executed by order of the Magistrate who made the requisition for the bond. Therefore it is open to the Chief Presidency or District Magistrate to cancel bonds in cases in which the order for security has been affirmed by the Sessions Judge or the High Court in appeal or by the latter in revision.

It is noteworthy that it is only the power of cancelling a bond that is conferred by the Section. So a District Magistrate cannot alter or modify it. (*Baines* v. *Emp.* 23 *Cr. L. J.* 394).

The cancellation that is provided for is the cancellation of a bond that has been taken under Sec. 118 and not the cancellation of an order initiating a proceeding under Chap. VIII for the taking of a bond. (*Bansidhar* v. *Indar Narain Sing* 24 *Cr. L. J.* 865).

Jurisdiction under the section as compared with appellate Jurisdiction.

The special jurisdiction under Sec. 125 can be exercised only subsequent to the execution of a bond and not prior to it.

The ground of interference is "for sufficient reasons"—a power as wide as possible. The ground of interference under Sec. 124 for the purpose of releasing a person imprisoned for failure to furnish security is that he may be released without hazard to the community or to any other person.

All orders for bonds of any kind have now been made appealable to the Sessions Judge generally in the Muffossil and to the High Court in the Presidency towns. The Appellate Court can interfere whether the security has been furnished or not on the ground that the order for security is illegal or improper and should not have been made either on grounds of law or on the merits but it cannot interfere either on the ground that the person imprisoned may be released without hazard to the community or to any other person or that the bond is no longer necessary although the order for its execution was properly made. Herein lies the distinction between the powers of an

Appellate Court and the powers under Secs. 124 and 125. To put it otherwise under Secs. 124, 125 it is competent to the District or Chief Presidency Magistrate to take note of circumstances subsequent to the making of the order for security which is wholly beyond the scope of the powers of the Appellate Court which must confine itself to the period of time covered by the record before it. The powers of the Appellate Court must be invoked within the time limited by law but the special powers under Secs. 124 and 125 can be invoked and exercised at any time during the currency of the bond.

The powers of the Sessions Judge or the High Court under Sec. 123 in cases in which the period of the bond demanded exceeds one year and it is not furnished are such as to enable the Sessions Judge or the High Court to pass such orders as may be thought fit. The Appellate Court may alter or reverse such order or make any amendment or any consequential or incidental order that may be just or proper. The High Court in revision may exercise all the powers of an Appellate Court.

Can the Sessions Judge or the High Court on a reference under Sec. 123 interfere on the grounds contemplated in Secs. 124 and 125?

The reasonable answer must be in the negative. In a reference under Sec. 123 there cannot ordinarily be between the making of an order under Sec. 118 and the disposal of the case by the higher Court such efflux of time as to make it possible for events taking place which render it undesirable for the order for security to be in force. The Sessions Judge or the High Court is to make the final order after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary. This is similar to the exercise of the powers of the appellate court which can take additional evidence or cause it to be taken under Sec. 428.

It has been distinctly held that this provision for taking additional evidence can have no application in a case dealt with under Sec. 125. This emphasises the fact that the jurisdiction under the section is neither appellate nor revisional but original—rather quasi judicial.

Ground of interference.

Bonds for keeping the peace and those for good behaviour may alike be cancelled under Sec. 125. There is no limitation imposed on the exercise of the power which can be invoked whenever in the opinion of the Magistrate concerned there are sufficient reasons for doing so. It is entirely in the discretion of the Magistrate concerned to decide what is sufficient reason having regard to the circumstances of the case in question.

The power to cancel a bond is not limited to the ground that the bond was no longer necessary as was the view taken at one time. But bonds may be cancelled on any ground including the ground that it should not have been taken. This has been laid down by a Full Bench of the Calcutta High Court in *Nabu Sardar* v. *Emp. 34 Cal. 1 S. C. 11 C. W. N. 25 S. C. 4 C. L. J. 428 which overrules Barpa Ch. Dey* v. *Janmejoy Dutt 32 Cal. 948.*

In the Full Bench decision referred to above it has been pointed out that "Sufficient reasons" means reasons which the Magistrate thinks sufficient. If the Magistrate thinks that the bond ought never to have been required that is a sufficient reason. There is nothing in the section to qualify or restrict the natural meaning of the language used or to indicate that "sufficient reasons" means reasons in connection with something which has occurred after the execution of the bond.

In other Courts a different view has been taken for example that the District Magistrate cannot set aside the whole proceedings of the subordinate Magistrate as being without jurisdiction and void *ab initio* (*Durga Sing* v. *Amar Dayal 23 Cr. L. J. 281*).

According to this view the only ground on which a District Magistrate or a Chief Presidency Magistrate can cancel a bond is that something has supervened since the date of the first court's order which satisfies the District Magistrate or the Chief Presidency Magistrate that there is no longer any necessity for keeping the accused person under bond. According to this view if the District Magistrate or the Chief Presidency Magistrate thinks that the order of the first court is not main-

tainable on the evidence as presented his duty is not to pass an order under Sec 125 but to refer the case to the High Court (*Nazimuddin Khay* v. *Muhammad Ziaul Nabikhan 20 A. L. J. 521 S. C. 44 A. 614 Ramdin* v. *Nangadar Sing 24 Cr. L. J. 204 ; Emp.* v. *Balwant Sing 24 Cr. L. J. 616*).

The powers of cancellation of a bond are not limited to the ground that it was no longer necessary. That does not mean that that itself is not a good ground for cancelling a bond. Bonds may be cancelled on that as well as other grounds and not on that ground alone.

The view taken by the Full Bench of the Calcutta High Court coincides with that taken by a Full Bench of the Madras High Court in *Mare Goud In re 37 Mad. 125 S. C. 25 M. L. J. 459*. The same view has also been taken by the Court of the Judicial Commissioner of Nagpur. (*Emp.* v. *Dalli 16 Cr. L. J. 555*).

But the other view which was taken in *Barpa Ch.* v. *Janmejoy* which has been overruled by the Full Bench of the Calcutta High Court referred to above is in harmony with that taken by the Allahabad High Court. (*Banarsi Das* v. *Partab Sing 35 A. 103 S. C. 11 A. L. J. 16*).

As has been pointed out above the jurisdiction conferred by Sec. 125 is neither appellate nor revisional but original in the exercise of which the Magistrate can pass final orders in respect of an order for security.

The view taken that on application for the cancellation of a bond the District Magistrate or the Chief Presidency Magistrate can only make a reference to the High Court recommending the cancellation of the bond in question and not pass final orders himself is wholly unwarranted (*Shaukar Lal* v. *Emp. 41 A. 651 S. C. 17 A. L. J. 830 ; Bepin Behari Mukherji* v. *Emp. 3 Pat. L. J. 302*), equally so is the view taken that because the Code gives the Magistrates mentioned in Sec. 125 jurisdiction in the matter of cancellation of bonds it is they alone who should be applied to and not the High Court. (*Lalji 40 All. 140 S. C. 16 A. L. J. 39*).

The true view is that Sec. 125 gives the District Magistrate and the Chief Presidency Magistrate power to cancel a bond for

security of any kind for any reasons they think proper. They are responsible for the peace of the area entrusted to their care and they must have full plenary powers as to who should be kept under restraint as a matter of safeguard against the violation of law and order. This is wholly unconnected with appeal provided by law in cases of security and revision by the High Court.

Finality of order under section.

An order under Sec. 125 is final. This means that whether the District Magistrate or the Chief Presidency Magistrate has made an order for cancellation of a bond or refused to make such an order under Sec. 125 no higher court has any power to set him right so far as the order under Sec. 125 is concerned but the powers of revision of the High Court in respect of all orders for security are not in any way affected by Sec. 125. Nor is the High Court incompetent to interfere if the Magistrate proposing to act under Sec. 125 makes an order which is neither a cancellation of a bond nor refusal to cancel a bond, in other words an order which is not justified by Sec. 125.

It is a well-known rule of interpretation of statute that when an enactment says that a thing may be done by a court no higher court will direct such thing to be done when the inferior court refuses to do it. The statute gives a discretion to the court in question which must be given a free scope. The higher court can insist upon the inferior court not doing any thing illegal under the garb of exercising a discretion vested in it by law.

It is noteworthy that the amending Act of 1923 has added an explanation to Sec. 435 that all Magistrates whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of Sub-sec. 1 of Sec. 435 and of Sec. 437. This can hardly be said to have the effect of making orders under Sec. 125 liable to revision. There is no doubt that the District Magistrate is inferior to the Sessions Judge and the Presidency Magistrate is inferior to the High Court and that the records of cases decided by such Magistrates

including applications under Sec. 125 may be called for under Sec. 435. What bars interference in revision is not the lack of authority to call for the records and examine the proceedings but the nature of the powers with which the particular Magistrates have been invested. Whenever an order for security whether for keeping the peace or for good behaviour has been made the person aggrieved by the order can appeal to the Sessions Judge if in the Mufassil and to the High Court if in the Presidency Towns. The appeal must be filed within the period of limitation. If the bond is for more than one year and is not furnished the matter automatically goes before the Sessions Judge or the High Court as the case may be. In such cases there is no question of appeal.

If unsuccessful in the appeal to the Sessions Judge the person aggrieved may move the High Court in revision in conformity with the rules regulating the practice as to motions.

At any time since the making of the order for bond and before the expiration of the period fixed therein the District Magistrate or the Chief Presidency Magistrate as the case may be, may be moved under Sec. 125 in all cases where the security has been furnished and under Sec. 124 in all cases where there has been default and the person proceeded against has been imprisoned.

The jurisdiction under Secs. 124, 125 is not appellate or revisional but original of a quasi-judicial nature in the exercise of which it has been held that the Magistrate is not bound even to hear the lawyer of the petitioner before passing orders. (*Khetrobasi Sahu* v. *Emp. 19 Cr. L. J. 246*).

But this view is inconsistent with the general policy of the legislature.

In dealing with a case under Sec. 125 it has been held, it cannot be remanded to the court of first instance for additional evidence under Sec. 438. (*Mussamat Nasiban* v. *Emp. 20 Cr. L. J. 221*).

The technical order of remand under Sec. 428 may not be made but there is no reason to hold why the Magistrate should not be at liberty to ask the subordinate court which made the order for security to supply information on any point requiring

elucidation. On the other hand the peculiar nature of the jurisdiction conferred on District Magistrates and the Chief Presidency Magistrate makes it reasonable and proper for the superior Magistrate to call for explanation or information from the subordinate Magistrate whether as to circumstances appearing on the record or coming into existence subsequent to the making of the order for security. An enquiry for this purpose by the superior Magistrate himself should also be held to be proper. Such enquiry whether by the subordinate or the superior Magistrate may take place untrammelled by the rules of evidence and may be founded on police reports.

All that happens in connection with a proceeding under Sec. 125 must be left out of consideration by the higher court which may have occasion to deal with the matter in appeal or revision as being matters extrajudicial and should not in any way influence the higher court in coming to its conclusion on the record legally made.

The peculiar nature of the jurisdiction appears from the decision in *Dayanath Thakur* v. *Emp. 14 C. W. N. 306* in which it has been held that in dealing with an application under Sec. 125 the Magistrate cannot make an order under Sec. 476 directing the prosecution in respect of a document filed by a party at whose instance the proceeding for the bond was started inasmuch as such document does not come before him in the course of a judicial proceeding.

CHAPTER XXIV

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—APPEAL.

Appeal.

Appeal from order requiring security for keeping the peace or for good behaviour.

406. *Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—*

(a) If made by a Presidency Magistrate, to the High Court;

(b) If made by any other Magistrate, to the Court of Session:

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

Sec. 406 gives a right of appeal in all cases of security for keeping the peace or for good behaviour.

The order if made by a Presidency Magistrate is appealable to the High Court and if made by any other Magistrate to the Court of Session.

There is no appeal in cases of bonds for more than one year where the proceedings have to be placed before the Sessions Judge and in the case of a Presidency Magistrate before the High Court for orders under Sec. 123, clauses 2 and 3A.

The scope of the section has been very much enlarged by the amending Act of 1923. Formerly there was an appeal to the District Magistrate only against orders for security for good behaviour made by a Magistrate other than the District Magistrate or a Presidency Magistrate.

Any person aggrieved by an order refusing to accept or rejecting a surety under Sec. 122 may appeal against such order, if made by a Presidency Magistrate to the High Court if made by the District Magistrate to the Court of Session or if made by a Magistrate other than the District Magistrate to the District Magistrate.

Appeal from order refusing to accept or rejecting a surety.

406A. *Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,—*

(a) if made by a Presidency Magistrate, to the High Court;

(b) if made by the District Magistrate, to the Court of Session; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This provision for appeal in the matter of sureties is new and has been added for the first time by the amending Act of 1923.

Can a person who offered himself as a surety but was not accepted or who was accepted but afterwards rejected as an unfit person be called an aggrieved person within the meaning of Sec. 406A? If so, an appeal will lie at his instance also.

An appeal may be on a matter of fact as well as a matter of law. (Sec. 418).

An appeal may be dismissed summarily under Sec. 421 of the Code without the records being called for or after they have been called for. It is optional with the Court to call for the record or not.

In disposing of an appeal which has not been summarily dismissed the Court is to peruse the record, hear the appellant or his pleader if he appears and the public prosecutor if he appears. (Sec. 423).

The Court is bound to hear the public prosecutor only on the side of the prosecution. Under Cl. (*t*) of Sec. 4 "public prosecutor" includes a person acting under the direction of a public prosecutor appointed under Sec. 492 under Cl. 1 of which the Governor-General in Council or the Local Government may appoint generally or in any case or for any specified class of cases in any local area one or more officers to be called public prosecutors

Under Cl. (2) of Sec. 492 the District Magistrate or subject to the control of the District Magistrate the Sub-Divisional Magistrate may in the absence of the public prosecutor or where no public prosecutor has been appointed appoint any other person not being an officer of police below such rank as the Local Government may prescribe in this behalf to be public prosecutor for the purpose of any case

Before the amendment there was considerable anomaly in the provisions of Secs. 123 and 406. The matter was discussed in an editorial note in the columns of the *Calcutta Weekly Notes* (20 C. W. N. 173N) which is reproduced below as throwing light on the history of the amendment of Sec. 406.

"Any person ordered by a Magistrate other than the District Magistrate to give security for good behaviour under Secs. 108, 109, 110 may appeal to the District Magistrate irrespective of the period for which the bond has been ordered to be executed. Now a person against whom an order has been made by a Magistrate other than the District Magistrate to execute a bond for good behaviour for a period exceeding one year has the right of appeal to the District Magistrate under Sec. 406 but whether or

not he exercises the right of appeal the matter goes to the Sessions Judge under Sec. 123. Both the Sessions Judge and the District Magistrate have power to decide the case on the merits. What are the two courts to do if the case is pending before both on appeal and reference respectively.

Is it incumbent in such a case on the person ordered to furnish security to file an appeal before the District Magistrate? The importance of this question becomes apparent on a reference to Sec. 439 Cl. 5 which lays down that when under the Code an appeal lies and no appeal is brought no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Now if in a case coming within the purview of Sec. 123 no appeal is preferred to the District Magistrate and the order for bond is affirmed by the Sessions Judge on reference would an application to the High Court in revision be barred under Cl. 5 of Sec. 439? Surely it should not but the whole difficulty is caused by the anomalous provisions of Secs. 123 and 406 and the obvious remedy is to amend Sec. 406 and make the appeal lie to the Sessions Judge instead of to the District Magistrate.

The previous history of the sections shows that this was the provision in the first Code of Criminal Procedure that was passed. Any person convicted on a trial held by a Magistrate of the first class might under Sec. 408 appeal to the Sessions Judge and by the law as it stood in Sec. 409 of the Code of 1861 an appeal lay to the same Court in cases of security for good behaviour also. In passing the Code of 1872 the legislature showed great anxiety to lay down clearly the position in which the subordinate Magistrates stood to the District Magistrate and in going to emphasise the responsibility of that officer for the peace and order of the district enacted that appeals from orders by Magistrates for security for good behaviour should in every instance lie to that officer. The result has been the anomaly noticed above. It is to be hoped that in amending the Code of Criminal Procedure which is likely to be done in the near future the legislature will make the necessary alterations."

The legislature has now amended section 406 and made all orders of security whether for keeping the peace or for good

behaviour appealable to the Sessions Judge, there being no appeal where there is a reference.

Another anomaly in connection with the administration of Secs. 123 and 406 arose in cases where of several persons proceeded against for security some were ordered to execute bonds for one year and others for a longer period and there was default in furnishing the security.

The matter was discussed in an editorial note in the columns of the *Calcutta Weekly Notes* (21 C. W. N. 98N) which is reproduced below:

"Under the law as it now stands the case of some of the accused will go to the Sessions Judge on a reference under Sec. 123 and the case of the others to the District Magistrate in appeal. Instead of creating this undesirable situation of placing one judgment before two superior Courts for consideration at one and the same time it is desirable that the whole matter should be disposed of by one tribunal. As suggested by us in our previous notice of the subject (20 C. W. N. 173N) the obvious remedy is to amend Sec. 406 and make the appeal lie to the Sessions Judge instead of to the District Magistrate which was the law in the first Code of Criminal Procedure that was passed in this country. We draw the attention of the legislature to this matter and hope that it will receive proper attention at the next revision of the Code."

Besides the amendment of Sec. 406 the legislature has now added a new Sub-sec. (3-A) to Sec. 123 under which the cases of the persons ordered to furnish security for one year will also be placed before the Sessions Judge under Sec. 123.

Can the Appellate Court make the bond more onerous?

It is laid down in Cl. (*b*) of Sec. 423 that the Appellate Court cannot enhance the sentence.

According to the spirit of this provision which may not technically apply to an order for security the Appellate Court cannot enhance the period of the bond demanded by the trial Court or increase the amount thereof.

The Court of the Judicial Commissioner of Oudh has held that the Appellate Court is not competent to enhance the amount

of security demanded by the trial Court. (*Rameshwar Bakeh Sing* v. *K. E. 24 Oudh Cases 286*).

Subject to the aforesaid limitation the Appellate Court may alter or reverse the order appealed against or make any amendment or any consequential or incidental order that may be just or proper. (Sec. 423 cl. c. d.).

Additional Evidence.

In dealing with an appeal the Appellate Court if it thinks necessary may take additional evidence or cause it to be taken down by a Magistrate. (Sec. 428).

The words used in the section are "a Magistrate."

Thus it is not necessary that the additional evidence should be recorded by the Magistrate who tried the case out of which the appeal arises.

It is noteworthy that in an appeal to the District Magistrate against an order of forfeiture of a bond no additional evidence can be taken as provided for in Sec. 428 for that section expressly lays down that the proviso is applicable "in dealing with any appeal under this chapter," *i.e.*, chapter XXXI of the Code which does not include Sec. 515 which deals with appeals against forfeiture of bonds.

Difference of opinion between Judges hearing appeal in the High Court.

In an appeal against the order of a Presidency Magistrate if the Judges composing the Court of appeal are equally divided in opinion the case with their opinions thereon shall be laid before another Judge of the same Court and such Judge after such hearing if any as he thinks fit shall deliver his opinion and the judgment or order shall follow such opinion. (Sec. 429).

Order of forfeiture of bond.

An order passed by any Magistrate other than a District Magistrate, *i.e.*, any subordinate Magistrate or an Additional District Magistrate in connection with forfeiture of bonds is

appealable to the District Magistrate or if not so appealed may be revised by him.

There is no provision for an appeal against such an order passed by a Presidency Magistrate. (Sec. 515).

What the Judgment in appeal should be.

The judgment in appeal must show on the face of it that the case of each accused has been taken into consideration and reasons should be given as far as may be necessary to indicate that the Court has directed judicial attention to the case of each accused. (*Jamait Mullik 35 Cal. 138 S. C. 12 C. W. N. 134*).

It is the duty of the Appeallate Court to consider the defence evidence and come to its own decision irrespective of the reference or absence of reference to it by the pleaders for the defence. (*Fidoi Hussain* v. *Emp. 40 Cal. 376*).

The Appellate Court should set out in detail all the points in the evidence and the reasons for the order. (*Gayani* v. *Emp. 17 Cr. L. J. 461*).

The judgment in appeal must give an indication of the fact that the evidence for and against the accused has been weighed. (*Sarwan* v. *Emp. 14 A. L. J. 279*).

It is not necessary for the Appellate Court to set out over again in detail all the points in the evidence and the reasons provided it is clear and the Court has shown by its judgment that it has taken the trouble to rehear the case. (*Gayani* v. *Emp. 17 Cr. L. J. 461*).

A District Magistrate should not dispose of an appeal against an order requiring a person to furnish security otherwise than by a judgment showing on the face of it that he applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant both in the Court below and in his memorandum of appeal. (*Lal Behary* v. *Emp. 38 All. 393 S. C. 14 A. L. J. 445*).

Powers of Appellate Court.

Under Sec. 423 clauses (*c*) and (*d*) the Appellate Court may in case of an appeal against an order for security alter or reverse

such order and make any amendment or any consequential or incidental order that may be just and proper. The question is whether the Appellate Court can alter the finding of the Magistrate as to the case coming under a particular clause of Sec. 110 to a finding under some other clause. The importance of this arises out of the fact that under Sec. 118 (Proviso) the final order must be in conformity with the preliminary order recorded under Sec. 112.

In a case the accused was bound over under Sec. 110 clause (*f*) as being a desperate and dangerous character. On appeal the District Magistrate found that Cl. (*e*) was more appropriate that is the accused habitually committed or attempted to commit or abetted the commission of offences involving a breach of the peace. The District Magistrate reduced the period of the bond and the amount of the security.

It was held that inasmuch as Cl. (*f*) of the section described the offence in Cl. (*e*) in an aggravated form and the accused was not prejudiced there was no ground for interference in revision. (*Azizal Jabarkhan* v. *Emp. 21 Cr. L. J. 352*).

Appeal if lies to Privy Council.

An order of the High Court confirming an order binding down the petitioner to be of good behaviour and requiring him to execute a bond with security is not appealable to the Privy Council under Cl. 41 of the Letters-patent. (*Chintaman Sing* v. *Emp. 14 Cr. L. J. 599*).

CHAPTER XXV.

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED—

Reference to Sessions Judge: Sec. 123.

On a reference under Sec. 123 the higher court after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary may pass such order on the case as it thinks fit. Sec. 123, clause 3—Such court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary may pass such order on the case as it thinks fit.

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years. The words of cl. 3 of Sec. 123 are wide enough to give discretionary power to the Sessions Judge or the High Court as the case may be to deal with the case as it thinks fit. (*Emp.* v. *Amir 35 Bomb. 271 S. C. 13 Bomb. L. R. 203*).

The Sessions Judge may require from the Magistrate any further information or evidence. This is intended to be a substitute for the provision in Sec. 438 (additional evidence in appeals). Under Sec. 428 the additional evidence may be taken by the appellate court or by a Magistrate under its orders but Sec. 123 contemplates that the additional evidence must be coming from the Magistrate, in other words that it should be taken by the Magistrate if directed by the Sessions Judge to do so. It is noticeable that in the Code of 1882 the words were "such court after examining any further information or evidence." This was construed to mean that additional evidence if any was to be taken by the Sessions Judge himself. In the Code of 1898 the words "from the Magistrate" were added with the result that the words as they are, mean that the

additional evidence is not to be taken by the Sessions Judge himself but by the Magistrate under orders of the Sessions Judge.

Scope of order under Sec. 123.

The Sessions Judge may pass any order in his descretion including an order discharging the accused, reducing the amount or period of the bond or the amount or number of sureties. But the section does not authorise a Sessions Judge to order the rehearing of a case. He can call for further information if he desires it or he can consider the evidence on the record and pass such orders as he thinks fit. (*Narayan Sing* v. *Emp. 25 Cr. L. J. 112*).

Theoretically the Sessions Judge can also increase the amount or period of the bond or the amount or number of sureties but practically this is a question which does not arise in a case in which the person proceeded against has already failed to furnish the security demanded.

The only limitation to the power of the Sessions Judge is that the period for which any person may be imprisoned for failure to give security shall not exceed three years.

Can the Sessions Judge order imprisonment for a period longer than that for which security is required.

Under Sec. 112 when a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, that term for which it is to be in force and the number, character and class of sureties required.

Under Sec. 118 if upon enquiry it is proved that it is necessary for keeping the peace or maintaining good behaviour as the case may be that the person in respect of whom the inquiry is made should execute a bond with or without sureties the Magistrate shall make an order accordingly, provided that no person shall be ordered to give security of a nature different from or of an amount larger than or for a period longer than that specified in the order made under Sec. 112.

Under Sec. 123, cl. (1), if any person ordered to give security under Sec. 106 or Sec. 118 does not give such security on or before the date on which the period for which such security is to be given commences he shall be committed to prison or if he is already in prison be detained in prison until such period expires or until within such period he gives the security to the court or Magistrate who made the order requiring it.

Cl. (1) means that in case of default the person ordered to give security shall be imprisoned for the whole period for which good behaviour is required, furnishing the security at any time effecting a release.

Under cl. (3) the only limitation to the Sessions Judge's power as to imprisonment in default of furnishing security is that the maximum period is three years.

In *King Emp.* v. *Kaimuddin Beg 23 A. 422* Blair and Burkitt J. J. point out that although it is within the competence of a Sessions Judge acting under Sec. 123, cl. (3) to direct that a person who has been ordered to give security shall on failure to give security be imprisoned for any term not exceeding three years yet it is advisable that the term of imprisonment in default ordered under that section should always be the same as the period for which the security is directed to be given. It has been held that where the accused has been on bail pending the reference under Sec. 123 if the imprisonment is directed to run from the date of the Sessions Judge's order it would practically amount to an enhancement of the sentence and though the Sessions Judge has jurisdiction to make such an order still in the absence of special reasons the imprisonment period in default of furnishing security should run not from the order of the Sessions Judge but from the order of the Magistrate. (*Allabad* v. *Crown 17 S. L. R. 160*).

Too narrow a view of the powers of the Sessions Judge on a reference under Sec. 123 has been taken in *Gaganchandra Das* v. *The Emperor 12 C. W. N. 463* in which it has been held that Sub-sec. 3 of Sec. 123 contemplates a decision by the Sessions Judge as to the merits of the order demanding security for good behaviour but it does not authorise the

Sessions Judge to consider the sufficiency of the security offered. It is difficult to follow the reasoning involved and it seems to be unjustifiable to curtail the plain meaning of the words used in the section by the legislature in a manner which necessarily involves the reading into the section of words which are not there.

Proceedings under Sec. 123 are not proceedings in confirmation but for orders and a Sessions Judge has to pass a definite order binding over and not to confirm an order passed by the Magistrate. (*Bahadur* v. *Emp. 1 Oudh W. N. 773*).

On a reference under Sec. 123 the Sessions Judge is bound to come to a decision on the merits of the order demanding security (*Inre Gagan Ch. Dass 12 C. W. N. 463*) and his order should on the face of it show that he has considered the case of each accused if there are several on the merits and separately from that of the others. (*Kalu-Mirza 14 C. W. N. 49*).

The applicability of the rule relating to judgments to orders made by Sessions Judges under cl. (3) of Sec. 123 was considered in several cases and it was held that it was open to doubt whether the provisions of Secs. 367 and 424 governed orders under Sec. 123 Sub-sec. 3. But at the same time it was held that even if these sections did not apply the Sessions Judge's order under Sec. 123 Sub-sec. 3 should show that he has considered the case of each individual person. Even if the order need not contain all the details required by Sec. 367 still each prisoner has a right to have his case considered on its own merits and the order should show that this has not been lost sight of. (*Kalu Mirza* v. *Emp. 14 C. W. N. 49*).

The point has been set at rest by the amendment of Sec. 367. Under Sub-Sec. 6 of Sec. 367 introduced in the Code for the first time in 1923 an order under Sec. 123 is a judgment and must conform to the provisions of Sec. 367 and must contain the point or points for determination the decision thereon and the reasons for the decision.

There is no appeal in cases when there is a reference to the Sessions Judge under Sec. 123. The order of the Sessions Judge made on a reference under Sec. 123 is open to revision by the High Court.

CHAPTER XXVI

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED— REVISION BY THE HIGH COURT.

Revision.

Under Sec. 435 of the Code the High Court can call for the record of any proceeding before any Magistrate or Sessions Judge in connection with an enquiry for keeping the peace or for good behaviour for the purpose of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed and as to the regularity of such proceeding and under Sec. 439 it can exercise all the powers of an appellate court, in other words it can alter or reverse the order appealed from and make any amendment or any consequential or incidental order that may be just and proper.

All orders for security whether for keeping the peace or for good behaviour are now appealable to the Sessions Judge, there being no appeal in cases where there is a reference to the Sessions Judge under Sec. 123 in which he can exercise powers similar to appellate powers. Against the orders of the Sessions Judge whether on appeal or reference an application in revision lies to the High Court.

The Sessions Judge and the District Magistrate have similar powers of calling for the records of inferior courts but all orders for security being appealable and proceedings at the instance of the party having the right to appeal being barred in cases where there is an appeal but no appeal is brought, no question arises as to the Sessions Judge or the District Magistrate making a reference to the High Court in respect of a final order for security made under Sec. 118.

But revision by the High Court is not limited to final orders and it being open to the High Court to quash a proceeding started by any Magistrate for the purpose of taking security either for keeping the peace or for good behaviour the Sessions Judge or the District Magistrate may in cases in which he thinks fit call for the records of a proceeding pending before a Magistrate and report the case to the High Court recommending the quashing of the proceedings.

Under Sec. 435 as now amended the District Magistrate or the Sessions Judge may when calling for the record direct, if the person proceeded against is in confinement, that he may be released on bail or on his own bond pending the examination of the record. This of course is on the assumption that the word "accused" in Sub-sec. 1 of Sec. 435 includes a person proceeded against under Chap. VIII. Even without the power now given by Sec. 435 the Sessions Judge could under Sec. 498 grant bail when calling for the record, so the new provision for bail added to Sub-sec. 1 of Sec. 435 really enables the *District Magistrate* to do something which he could not do before the amendment.

It is not open to the District Magistrate to report to the High Court under Sec. 438 a case which has been dealt with by the Sessions Judge in appeal or reference under Sec. 123 because the power under Sec. 438 is limited to cases in which the record may be called for under Sec. 435 which allows the records of inferior courts only to be sent for.

The High Court's power of revision is unlimited. It may interfere at any stage of the proceeding and on a matter of fact as well as on a matter of law. In one sense its powers of revision are wider than appellate powers and in revision the arm of the High Court is long enough to reach any kind of wrong.

Revision on Merits.

The High Court does not as a matter of practice ordinarily interfere in revision on the merits of a case but in view of the fact that the ordinary law of evidence is superseded by a special

provision in Sub-Sec. 4 of Sec. 117 and evidence which is not ordinarily admissible in a criminal case is made admissible in an enquiry under Sec. 110 of the Code it is incumbent on the High Court to examine the evidence in such cases more freely than in others.

The provision in cl. 5 of Sec. 117 about a joint enquiry being permissible when the persons proceeded against have been associated together in the matter under enquiry also makes it necessary for the High Court when a joint enquiry has been held against several persons to examine the evidence in order to ascertain whether the joint enquiry is justifiable or not.

Apart from these the very nature of the provision in Sec. 110 involves the determination of the issue whether the person proceeded against is a habitual offender or a desperate and dangerous character or not. When the trying Magistrate and the Sessions Judge have decided this issue in a particular way and declared the person proceeded against to be either a habitual offender or a desperate and dangerous character and the High Court is moved on the allegation that the lower court is wrong in coming to its conclusion as to the person proceeded against it is impossible for that court to come to any decision one way or the other without examining the evidence on which the finding of the lower court is based.

An application to the High Court for the revision of an order for security for good behaviour cannot be disposed of without entering into evidence except in a case where the finding on the evidence is not challenged but the final order is attacked on the ground that the procedure adopted by the Magistrate was irregular and defective.

So far as the Calcutta High Court is concerned the practice is settled of entering into evidence in revision more freely in these cases than in others. The Patna High Court also follows this practice. In a recent case (*Deodhar Pandey* v. *King Emp. 1925 Patna 6*) the High Court finding that both the original and appellate courts had misread the evidence examined it itself and in the result set aside the order under Sec. 110, Cr. P C. The Allahabad High Court does not seem to favour the idea

of revision on facts ordinarily but at the same time it has laid down that the administration of Sec. 110 has to be carefully watched and when evidence has been misunderstood or ignored difficulties have not been seen or the rules of evidence have not been followed and the Sessions Judge has reviewed the case in a very perfunctory way without noticing the palpable defects in the evidence the grounds upon which a man has been bound down require to be carefully scrutinised. (*Bhisheshwar Dayal* v. *Emperor 19 A. L. J. 668*). In this case the grounds upon which the High Court interfered were that the evidence of the police and of their principal witnesses were extremely vague, general in character and consisted almost entirely of reputation and that in the only instance in which they attempted to bring home to the applicant complicity with a definite piece of *badmashi* they had failed hopelessly.

The same court interfered in revision with an order made by a District Magistrate (on receipt of a police report) that a person was shown to be an undesirable man that he should leave the town at once or be prosecuted as a bad character. (*Ranpershed* v. *Emp. 19 A. L. J. 951*).

Practice in Revision.

In revision the usual practice is for the High Court to issue a rule calling on the District Magistrate in cases coming from the Muffussil and on the Chief Presidency Magistrate in cases arising in the Presidency Towns. The Sessions Judge although he may deal with the case in appeal is never required to show cause why the order complained of should not be set aside. The propriety of calling on the District Magistrate or the Chief Presidency Magistrate to show cause is more apparent in a case of security than in any other for it is the District Magistrate who is vested with full plenary powers to release a person at any time a person imprisoned for failure to give security or to cancel a bond which has been executed.

The explanation in answer to the rule is always submitted by the District Magistrate or the Chief Presidency Magistrate. It has been held that the explanation cannot in any way

supplement or add to the judgment (*Madhusuddan Das Gupta 7 C. W. N. 859 Jura Khan Sing 7 C. L. J. 238*) and the High Court cannot take into consideration any finding recorded in the explanation (*Ramkanto Das Cr. Rev. 1098 of 1909 decided on the 25th Sept., 1909*).

But in a case decided by a Presidency Magistrate when the record is called for the Magistrate may under Sec. 441 submit with the record a statement setting forth the ground of his decision or order and any facts which he thinks material to the issue and the High Court is bound to consider such statement before overruling or setting aside the said decision or order.

Right of being heard in proceeding in Revision.

No party, neither the Crown nor the petitioner, has any right to be heard either personally or by pleader in a proceeding in revision but no order can be made "to the prejudice of the accused until he has had an opportunity of being heard either personally or by pleader in his own defence."

Now does the expression "accused" in cl. (2) of Sec. 430 include a person proceeded against under Chap. VIII of the Code?

According to the interpretation put on the word "accused" by a Full Bench of the Calcutta High Court in *Narendro Nath Rudra Pal* v. *Sabrali Bhuiya 29 C. W. N. 701* in which it has been held that a party to a proceeding under Sec. 145 Cr. P. C. is not an "accused" within the meaning of Sec. 360 because that word when used by itself means a person accused of an offence the answer should be in the negative but in that case the position created is to say the least of it ridiculous and wholly inconsistent with the general policy of the Code. For the purpose of cl. (2) of Sec. 439 a person proceeded against under Chap. VIII should certainly be considered to be an accused.

(See earlier note in Chap. III where the question has been discussed).

As a matter of fact in actual practice no order is ever made in revision in cases of security whether for good behaviour or

for keeping the peace or in any other case to the prejudice of the petitioner without hearing him.

When the Judges composing the Court of revision are equally divided in opinion the case (as in an appeal) has to be referred to another Judge of the Court whose opinion becomes the judgment of the Court. (Sec. 439, Sub-sec. 1 of Sec. 429).

Quashing of Proceedings.

It has been held that it is not only competent but it is the obvious duty of the High Court to interfere with proceedings under the section even in the initial stage if it is established that they are not *bona fide* and that in substance their continuance would mean an abuse of the statutory provision on the subject (*Rajendro Narayan Sing* v. *Emp. 17 C. W. N. 238 S. C. 16 C. L. L. 467 Per-Mukherji J.*).

Quite recently in *Nafar Chandra Pal Choudhry* v. *Emp. 28 C. W. N. 23* the Calcutta High Court in quashing a proceeding under Sec. 110 held that although the High Court seldom interferes in the preliminary stage with the discretion of the Magistrate in taking action under the preventive sections of the Code of Criminal Procedure when the materials on which such orders are based are clearly insufficient to support the order the High Court should interfere and quash the order and proceeding. In this case the District Magistrate drew up proceedings under Secs. 107 and 110, cl. (*d*) of the Code on a report made by the Sub-Divisional Magistrate on a memorial made to the Governor which was sent down to the District Magistrate for disposal and the High Court held that reading the memorial and the report of the enquiry together it was impossible to hold that they furnished material sufficient to justify proceedings either under Sec. 107 or Sec. 110 Cr. P C.

Duty of High Court in Revision.

In revision the High Court is to see that the courts below approached the question in a fair way having regard to the interest not only of the prosecution but also of the accused.

(*Babu Pershad* v. *Emp. 13 Cr. L. J. 9 ; Meharban Sing* v. *Emp. 13 A. L. J. 1046*).

The defence evidence should receive particular attention in a case under Sec. 110 and when this has not been done it is the duty of the High Court to interfere (*Hakim Sing* v. *Emp. 13 A. L. J. 1055*).

It should always be remembered that Sec. 110 of the Code compared with Sec. 117 gives very extensive powers to Magistrates and should be administered with scrupulous care and materials ought not to be brought on the record which are not legally admissible in evidence and which are liable if on the record to prejudice the accused. (*Jabiruddin* v. *Emp. 20 Cr. L. J. 689*).

The Curing Section (537) how far Applicable.

Sec. 537 so far as an enquiry under Chap. VIII. is concerned will run thus:—Subject to the provisions hereinbefore contained, no order passed by a court of competent jurisdiction shall be reversed or altered on an appeal or revision on account of any error, omission or irregularity in the order judgment or other proceeding in an enquiry under Chap. VIII of the Code unless such error, omission or irregularity has in fact occasioned a failure of justice.

The first thing to be remembered is that an illegality is not an irregularity which can be cured under the section as laid down by their Lordships of the Judicial Committee in *Subramania Aiyar* v. *Emp. 25 Mad. 61*. This decision laid down that disobedience to an express provision as to the mode of trial was not a mere irregularity.

So disobedience to the express provision in the Code as to the mode of enquiry to be held under Chap. VIII cannot be condoned as an irregularity under the Section.

The illustration to Sec. 537 to which their Lordships pointed out as an index of what was meant has been repealed in 1923. The illustration was "A Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceeding".

Inherent Power of the High Court.

The new section 561-A expressly saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

Further Enquiry (Sec. 436).

No further enquiry can be ordered under the section in a case of bond. Previous to the amendment in 1923 Sec. 437 was the section corresponding to the present Sec. 436 which provides for further enquiry.

In *Imam Mandal* v. *The Empress 6 C. W. N. 163* Prinsep and Stanley J. J. pointed out that the further enquiry which could be ordered under Sec. 437 was into a complaint which had been dismissed or into the case of any accused person who had been discharged. Proceedings under Sec. 110 could neither be regarded as a complaint nor could they be regarded as a case in which any accused person had been discharged. The terms "accused person" and "discharged" in Sec. 437 referred to a person accused of an offence who had been discharged.

The same view was taken in *Dayanath Taluqdar 33 Cal. 8 ; Vela Tayi Ammal 33 Mad. 85.* But the contrary view was taken by the Allahabad High Court. (*Q. E.* v. *Muta Saddi Lal 21 All. 107 Sec also King Emp.* v. *Fojezuddin 24 All. 148*).

In one case after an order of discharge under Sec. 119 was made in a proceeding under Sec. 110 against a certain person the superintendent of police put up a note before the District Magistrate about the case and the District Magistrate without taking any fresh evidence or issuing a notice to such person to show cause why the order should not be set aside ordered further proceedings to be taken in the case by another Magistrate and directed him to issue notice to the accused. It was held that the order of the District Magistrate could not stand and must be set aside but it was open to him to issue notice himself to the accused to show cause why the order of

discharge should not be set aside and the case retired. (*Jaswant* v. *Emperor 19 A. L. J. 985*).

The legislature has now substituted for "accused person" "person accused of an offence".

CHAPTER XXVII

SECURITY FOR GOOD BEHAVIOUR FROM DESPERATE AND DANGEROUS CHARACTERS CONTINUED

Transfer.

A case under Sec. 110 can be transferred under Sec. 192 (*Chintanon Sing* v. *Emp.* 35 *Cal.* 243 *S. C.* 12 *C. W. N.* 299, *Hiranondo Ojha* v. *King Emp.* 1 *Pat.* 621). It follows that cases under Secs. 107, 108, 109, may be similarly transferred. Under Sub-Section 1 Sec. 192 any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may transfer any case of which he has taken cognizance for inquiry or trial to any Magistrate subordinate to him.

The irregularity of an erroneous transfer in good faith by a Magistrate not empowered to transfer a case under Chap. VIII has been held to be cured by Sec. 529 of the Code. (*Chintamon Sing* v. *Emp.*).

"Taking cognizance" has not been defined in the Code, Sec. 190 only lays down how cognizance may be taken of an offence. Besides enquiring into and trying cases of offences Magistrates have to deal with other cases notable among which are enquiries provided for in the Code for the prevention of offences. Under the circumstances "taking cognizance" must be given the meaning which it bears in the English language and the words "any case of which he has taken cognizance" in Sec. 192 cannot be taken to mean only cases of offences but these must mean any case of an offence of which the Magistrate has taken cognizance in the manner indicated in Sec. 190 of the Code or any other cases not of an offence but in which proceedings have been taken by the Magistrate under any provision of the Code.

In Chintanon Sing referred to above the words "any case" were interpreted to mean not only criminal case but all cases including those under Chap. VIII of the Code.

It was pointed out that "in the Code of 1872 Sec. 44 which corresponded to Sec. 192 of the present Code provided only for the transfer of criminal cases. In the amending Act of 1874 the word "Criminal" was struck out and it has been omitted from all subsequent enactments. The words "Criminal Case" are intended to be used in a limited sense and not to apply to every case cognizable by a Criminal Court. But when the words "Criminal case" have been altered to "any case" it is clear that the legislature intended that the power of transfer should not be restricted to criminal cases only and included the power of transfer of cases of every description."

Under Sec. 528 any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and may inquire into and try such case himself or refer it for enquiry or trial to any other such Magistrate competent to enquire into or try the same.

A case of enquiry under Chap. VIII can be transferred under Sec. 528. Under Sub-Sec. 3-B of Sec. 123 enacted for the first time in 1923 a Sessions Judge may transfer a proceeding referred to him under Sec. 123 to an Additional or Assistant Sessions Judge.

It is noticeable that the words in Sec. 192 and 528 have always been "any case" but in Sec. 526 before the amendment in 1923 the words were "any criminal case or appeal" and in consequence of this difference of language it was held that proceedings which could be transfered by the District Magistrate under Sec. 192 could not be transferred by the High Court under Sec. 526. Now the words "any criminal case" in Sec. 526 have been replaced by "any particular case" thus removing the anomaly referred to above and placing it beyond doubt that the High Court can transfer a case under Chap. VIII of the Code in exercise of its powers under Sec. 526 under which whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in the court in which the proceeding is pending or that some question of law of unusual difficulty is likely to arise or that an order of transfer will tend to the general convenience of the parties or witnesses or

that an order of transfer is expedient for the ends of justice it may transfer the proceeding to any other court of equal or superior jurisdiction subordinate to itself.

An order of transfer may be made in respect of an appeal against an order for security which in all cases lies to the Sessions Judge.

Grounds of Transfer.

It is expedient for the ends of justice to direct the transfer of a case from one court to another if circumstances have so transpired as to lead the accused to entertain a reasonable apprehension that he may not have a fair trial. (*Khetu Panday* v. *Mohim Nath Bisni 8 C. W. N. 75*).

As has been otherwise put whenever by reason of the words or conduct of a Magistrate before whom a case is pending a party reasonably apprehends that there is bias in him the case should be transferred though there may not be any actual bias. (*Lolit Mohan Moitra* v. *Muharaja Surya Kanto Acharya Choudhury 28 Cal. 709 S. C. 5 C. W. N. 749*).

In transferring a case from one Magistrate to another the court ought not to be guided by the impressions produced in its own mind as to the impartiality of the Magistrate but must look to the effect likely to be produced in the minds of the parties and their witnesses by the selection of a Magistrate. (*Pandurang Govind Inre. 25 Bomb. 179*).

In *Bibi Kulsum* v. *Umatul Mehdi 11 C. W. N. 121* some of the party against whom proceedings under Sec. 107 were instituted were further appointed special constables. The High Court transferred the case holding that in consequence of the order the petitioners might have a reasonable apprehension that they would not have a fair and impartial trial.

Who can move for Transfer.

The High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative. (Sub-Sec. 3 of Sec. 526).

Party interested

A party interested may make an application to the High Court. "Party interested" must be taken to be equivalent to the "public prosecutor, the complainant or the accused" in clause 8. The words must be reasonably interpreted.

It is quite clear from cl. (d) that the legislature had in view the common classification of parties and witnesses, so a party interested cannot mean a witness nor can it mean any one who may be taking an interest in the proceeding as understood in ordinary parlance. It must be taken to mean the persons contemplated by cl. (8) who are thereby given the right to apply for adjournment for the purpose of moving the High Court.

Complainant.

Can there be any complainant in a case under Chap. VIII of the Code? Magistrates can take action on information which may be conveyed to them in a petition filed in court by an individual alleging that the person complained against is likely to do something so far as the applicant is concerned which attracts the operation of one or other of the preventive sections in Chap. VIII. Is such a person a complainant within the meaning of Sec. 526 so far as the right to present an application to the High Court for the transfer of the proceeding is concerned?

Under clause 5 of Sec. 526 when "an accused person" makes an application under the section the High Court may direct him to execute a bond with or without sureties conditioned that he will if so ordered pay any amount which the High Court has power under clause 6-A of the section to award by way of costs to the person opposing the application.

Accused person.

Is a person proceeded against in a proceeding for security "an accused person" within the meaning of Sec. 526?

The amending Act of 1923 has in Sec. 340 prominently brought out the fact that besides persons accused of an offence there may be other accused persons, *viz.*, those against whom proceedings are taken under the Code. The significant change effected in sub-cl. (*ii*) of clause (*e*) of sub-sec. (1) of Sec. 526 clearly shows the intention of the legislature that cases of

offences as also those of enquiries into matters other than the commission of offences equally come within the purview of the section. What then should be the meaning given to the word accused in Sub-Secs. 5, 6 and 8 of Sec. 526?

On the answer to this question will depend whether on an application for transfer of a proceeding under Chap. VIII filed by the party proceeded against under any of the preventive sections the High Court can order him to execute a bond for payment of costs, whether the petitioner is bound to give the public prosecutor (the Superintendent and Remembrancer of Legal affairs who for the purpose of this section is the public prosecutor in the High Court) twenty four hours' notice before making his application before the Criminal Bench of the High Court, whether before the Magistrate he can as a matter of right ask for an adjournment to enable him to move the High Court.

It is inconceivable that in enacting the sub-Sections in question the legislature meant to include only persons accused of offences.

Consistently with the general policy of the Code the word "accused" should whenever it occurs by itself be taken to mean a person proceeded against in a Criminal Court whether for an offence or for the purpose of any other enquiry provided in the Code. But this view has not been accepted by a majority of the Judges composing the Full Bench in *Narendro Chandra RudraPal* v. *Sabarali Bhuiya 29 C. W. N. 701* in which the court had to consider the applicability of Sec. 360 to proceedings under Sec. 145 of the Code. The majority of the Judges took the view that the word "accused" means a person accused of an offence. In coming to this conclusion they took the change made by the amending Act of 1923 in Sec. 340 as the general indication of the meaning of the word accused in the Code whenever it stands alone.

In this view sub-Secs. 5, 6 and 8 of Sec. 526 do not apply to proceedings under Chap. VIII of the Code.

But as has been pointed out (See earlier note in Chap. III) the interpretation put on the word accused by the Full Bench is inconsistent with the general policy of the Code of Criminal

Procedure and a person proceeded against under Chap. VIII should come within the purview of Sub-Secs. 5, 6 and 8 of Sec. 526.

In *Wazid Ali Khan* v. *Emperor 41 Cal. 719 S. C. 18 C. W. N. 274* it has been held that cl. (8) of Sec. 526 is applicable to a proceeding under Sec. 107 and the person proceeded against is entitled to an adjournment to enable him to move the High Court for a transfer.

CHAPTER XXVIII

DISPERSING UNLAWFUL ASSEMBLIES.

Dispersing unlawful Assemblies.

Chap. IX of the Code of Criminal Procedure provides for dispersing two kinds of assemblies, *viz.*, unlawful assemblies and assemblies of five or more persons likely to cause a disturbance of the public peace.

The power is given to all Magistrates and officers in charge of police stations. The expression "unlawful assembly" has got a meaning of its own in law. An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing that assembly is to do any of the unlawful acts mentioned in Sec. 141 of the Indian Penal Code. Sec. 127 of the Code of Criminal Procedure gives power to all Magistrates and officers in charge of police stations in the Muffassil as well as in Calcutta to command such an assembly to disperse as also any other assembly of five or more persons which is not an unlawful assembly as understood in law but which is likely to cause a disturbance of the public peace. The members of such an assembly may not be actuated by any common object to do any unlawful act and the jurisdiction of a Magistrate or officer in charge of a police station to disperse such an assembly depends on the likelihood of a disturbance of the public peace being caused by such an assembly. It is for the Magistrate or police officer to decide whether there is such a likelihood or not and his discretion is final and independent of the control of any other authority.

The question is whether the assembly, in other words all the five or more persons should be likely to cause a disturbance of the public peace or it is enough if the likelihood comes from any one of them. The former view is entirely untenable and opposed to common sense and the law must be taken to be that any assembly composed of five or more persons any

one of whom is likely to cause a disturbance of the public peace may be commanded to disperse by any Magistrate or police officer in charge of a police station.

On such an order being given it is the duty of the members of an unlawful assembly or any other assembly of five or more persons likely to cause a disturbance of the public peace to disperse. Sec. 127 applies also to the police in the town of Calcutta. It is specially made applicable to the police in Calcutta by Sub-Section 2 but not to the police in Bombay.

The other sections of the Chap. provide for the dispersing of such assemblies by force both civil and military when they do not disperse in obedience to the order of a Magistrate or police officer in charge of a police station.

Disobedience of Order.

Disobedience of an order made by a Magistrate or police officer in charge of a police station is punishable under Sec. 188 of the Indian Penal Code and every member of the assembly commanded to disperse commits the offence.

In order to sustain a conviction under Sec. 188 it must be proved (1) that the order was duly promulgated by a public servant lawfully empowered to promulgate such order (2) that the accused knew of the order which he is alleged to have disobeyed (3) that the disobedience produced or was likely to produce harm.

As to (1) it must be proved in a case of disobedience of an order under Sec. 127 that the assembly of which the accused was a member was an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace.

As to (2) it follows that it must be proved that the order was directed to the accused. (*Nobo Kishore Chackorbartty* 7 *C. L. R.* 291).

As to (3) it is not necessary that the offender should intend to produce harm or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order

which he disobeys and that his disobedience produces or is likely to produce harm.

But mere proof that the accused has knowingly disobeyed an order duly promulgated is not enough. It must be proved that the disobedience caused or tended to cause obstruction annoyance or injury to any person lawfully employed. (*Ebrahim Sarkar 29 Cal. 236*).

An offence under Sec. 188 I. P.C. is punishable with simple imprisonment for one month or fine of two hundred rupees or both and with imprisonment of either description for six months or a fine of one thousand rupees or both if the disobedience causes danger to human life, health or safety. It is triable by a Presidency Magistrate or Magistrate of the first or second class. It is bailable but not compoundable. The police cannot arrest without warrant from a Magistrate and a summons is to be ordinarily issued in the first instance. Cognizance of an offence under the section cannot be taken except as provided for in Sec. 195 and under Sec. 487 Cr. P. C. a Magistrate whose own order has been disobeyed cannot try the case arising out of such disobedience.

Dispersing unlawful Assembly by Force.

Where an assembly commanded to disperse under Sec. 127 does not disperse force may be used by a Magistrate or police officer in charge of a police station to disperse such assembly.

Once the command has been given by a Magistrate or police officer in charge of a police station and disobeyed, any Magistrate or police officer in charge of a police station (who may not be the same Magistrate or police officer who gave the command) may proceed to disperse the assembly by the use of force.

The words used in Sec. 128 clearly indicate that the power to disperse by force is given to all Magistrates and police officers in charge of police stations and not only to the Magistrate or police officer who gave the command to disperse. The only thing necessary is that the command must have been in the first instance given by a Magistrate or police officer in charge of a police station.

The assembly may be dispersed by force not only when it does not disperse after being commanded to do so but also when without being commanded to disperse it conducts itself in such a manner as to show a determination not to disperse.

In dispersing an assembly by force the Magistrate or police officer may require the assistance of any male person not being an officer or soldier in His Majesty's Army or a volunteer enrolled under the Indian Volunteer's Act and acting as such.

Disobeying order to render assistance.

If a person on being called upon to assist refuses to do so he is liable to be punished under Sec. 188 I. P. C.

The assistance may be required for the purpose of dispersing the assembly and if necessary arresting and confining the persons who form part of it in order to disperse the assembly or that they may be punished according to law.

Under Schedule 2 of the Code the police cannot arrest without warrant a person who has committed an offence under Sec. 188 I. P. C. but under Sec. 128 Cr. P. C. the members of the assembly commanded to disperse or conducting in such a manner as to show a determination not to disperse may be arrested and confined.

The arrest and confinement may be only for the purpose of dispersing the assembly and not for prosecution for an offence under Sec. 188.

But the arrest and confinement are limited to the members of the assembly. A person required to render assistance but who refuses to do so cannot be arrested and confined but may be prosecuted in the usual course under Sec. 188 I. P. C.

Scope and applicability of Section 128.

Section 128 lays down that the power to disperse by force may be exercised by a Magistrate or police officer in charge of a police station whether within or without the Presidency towns. That would at first indicate that the section 128 is made applicable in toto to the police in Calcutta and Bombay but the power to command an assembly to disperse is given by section 127 which is made applicable to the police in

Calcutta only (sub-section 2 section 127) and not to the police in Bombay.

The power of dispersing an assembly by force may be exercised under section 128 under two circumstances, *viz.*, where the assembly on being commanded to disperse does not disperse or when without being commanded to disperse it conducts itself in such a manner as to shew a determination not to disperse. Now the power to command an assembly to disperse under section 127 has not been given to the police in Bombay and therefore the power under section 128 can be exercised by the police in Bombay only when an assembly without being commanded to disperse conducts itself in such a manner as to show a determination not to disperse.

Use of Military Force.

Military force may be employed for dispersing an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace if such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed. (Section 129).

Impossibility of dispersing in any other way and necessity of dispersing for the public security are the two things necessary to justify the use of military force.

The assembly may be dispersed by military force by the Magistrate of the highest rank who is present. It is necessary therefore that the Magistrate must be present before military force may be used to disperse an assembly. The power to employ military force is not given to a police officer.

It is for the Magistrate to decide whether the necessary conditions for the application of section 129 are present.

The Magistrate may require any commissioned or non-commissioned officer in command of any soldiers or volunteers to disperse such assembly by military force and to arrest and confine such persons forming part of it as the Magistrate may direct or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law. (Section 130).

The military officer can arrest and confine only such persons forming the assembly as the Magistrate may direct.

The military officer is bound to obey the requisition of the Magistrate.

But he can proceed in such manner as he thinks fit. He has discretion as to the mode of operation and the Magistrate cannot interfere with his discretion in this respect.

The military officer is enjoined to use as little force and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining the persons forming such assembly.

Even without the requisition of a Magistrate any commissioned officer of His Majesty's army may disperse an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace by military force when the public security is manifestly endangered by any such assembly and no Magistrate can be communicated with. A non-commissioned officer has no such power.

As soon as it becomes practicable for the military officer to communicate with a Magistrate he is bound to do so and he is bound to obey the instructions of the Magistrate as to whether he shall or shall not continue to deal with the assembly.

Prosecution in connection with the dispersing of an unlawful assembly.

Under section 132 no prosecution against any person for any act purporting to be done (under Chapter IX of the Code) in connection with the dispersing of unlawful assemblies or assemblies of five or more persons likely to cause a disturbance of the public peace can be instituted in any Criminal Court except with the sanction of the local Government and no prosecution can be started against a soldier or military officer except with the sanction of the Governor-General in Council. (Section 132).

There is no immunity from proceedings in the civil court.

Act done in good faith protected.

No Magistrate or police officer acting under Chapter IX of the Code in good faith, no commissioned officer of His Majesty's army acting under section 131 in good faith, no person doing any act in good faith in compliance with a requisition under section 128 or 130 and no inferior officer or soldier or volunteer doing any act in obedience to any order which he was bound to obey shall be deemed to have thereby committed an offence.

CHAPTER XXIX.

PUBLIC NUISANCE.

Chapter X of the Code provides for preventive measures against public nuisances.

Chapter XIV of the Indian Penal Code deals with substantive offences in relation to public health, safety, convenience.

Section 268 I. P. C. makes a person guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Special provisions are made in sections 269 to 289 for the punishment of various kinds of public nuisances and section 290 provides for the punishment of a fine up to two hundred rupees for committing a public nuisance in any case not otherwise punishable under the aforesaid sections.

Chapter XIV of the Penal Code provides for punishment for offences arising out of public unisances created by that statute whereas section 133 is intended for the prevention of such offences as also the removal of such nuisances.

The legislature has dealt with the subject of public nuisance in Chapter X of the Code in two different manners *viz.* under section 133 and the following sections up to section 142 and under section 143, in other words it has provided for the removal of a nuisance under sections 133 to 142 and for prohibiting the repetition or continuance of a nuisance under section 143.

Section 133 a preventive measure.

Section 133 of the Code is a preventive measure. It seeks to prevent (1) inconvenience to the public by any unlawful

obstruction or nuisance (2) injury to the health or physical comfort of the community by obnoxious trade or occupation, (3) conflagration or explosion by the construction of any building or the disposal of any substance (4) injury to persons by and to persons in the neighbourhood by the dangerous condition of any building tent or structure or tree, (5) danger to the public arising from any tank, well or excavation, (6) danger to the public arising from any dangerous animal.

Changes effected by the amendment of 1923.

All Magistrates of the first class have now been empowered to take action. Formerly only those Magistrates of the first class who were empowered by the Local Government in that behalf could institute proceedings under section 133.

Formerly only a building likely to fall was provided for but now the scope of the clause has been enlarged so as to include a tent or structure and a tree.

Formerly there was no provision as to dangerous animals but now they have been provided for.

The procedure to be followed by the Magistrate in cases in which the existence of the public right in a way, river, channel or place is denied has been laid down in section 139-A to set at rest the conflict of judicial opinion on the point.

The clause relating to trade or occupation has been so worded as to attract the operation of the section when the conduct of the trade or occupation in question is objectionable though not the trade or occupation itself. This is in consequence of the view taken in some cases that section 133 did not apply when the conduct alone of a harmless trade or occupation was objectionable.

Section 133 as it stood in the Code of 1898 before the amendment of 1923 was exactly the same as in the Code of 1882.

Magistrates having jurisdiction.

A Magistrate of the second and third class cannot initiate a proceeding under section 133 but a Magistrate of the second class can dispose of it if a proceeding drawn up by a

competent Magistrate has been referred to him by such Magistrate for the purpose of disposal if the party proceeded against appears before him and shows cause against the conditional order.

A Sub-divisional Magistrate who may be a Magistrate of the second class may take action under the section.

Presidency Magistrates are not empowered to act under the section which apparently is intended for application in the Muffossil.

The Police Acts and the well-developed law relating to municipal administration in Presidency Towns obviate the necessity of a provision like that of section 133 in those areas.

If a Magistrate not empowered in this behalf makes an order under section 133 as to a local nuisance his proceedings shall be void. [Sec. 530 (*g*)].

Material on which action may be taken.

Action may be taken on a police report or other information conveyed in an application by an interested party.

The Magistrate may before taking action take such evidence as he thinks fit if any is forthcoming.

The Magistrate can assume jurisdiction only if on the information and on the evidence (if any) he considers that the nuisance in question exists.

First thing to be done.

The first thing to be done by the Magistrate is to draw up a conditional order in terms of form No. XVI in Schedule V of the Code in which the person proceeded against is to be called upon to do the thing necessary to be done or if he objects so to do to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order and move to have the order set aside or modified.

Service of conditional order.

The conditional order is to be served on the person against whom it is made like a summons. If it cannot be

so served it shall be notified by proclamation and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

It is the Magistrate's duty to decide which place or places will be the fittest for the purpose and there must be the order by the Magistrate to that effect; omission to stick up a copy of the order at the fittest place will vitiate the final order. An order made behind the back of the person affected by it without making the effort enjoined by law to convey the initial order to the knowledge of the person against whom it is made is a bad order in the eye of law.

Steps in obedience to conditional order.

The person against whom the conditional order is made must either (1) perform the act directed by the initial order within the time and in the manner specified in that order or (2) appear in accordance with that order before the Magistrate mentioned in the order and show cause against it or (3) *apply to the Magistrate who made the initial order* to appoint a jury to try the question whether the order made is reasonable and proper.

Disobedience of conditional order.

If the person proceeded against does not do any of the above three acts the conditional order is to be made absolute, further he is liable to be punished under section 188 I. P.C.

Procedure when party appears and shows cause.

If the person proceeded against appears and shows cause before the Magistrate mentioned in the order who may not be the Magistrate who made the conditional order but may be some other Magistrate of the first or second class the Magistrate is to take evidence in the matter as in a summons case.

The Magistrate shall first take the evidence produced by the party on whose application the proceeding has been started and then take all such evidence as the opposite party produces

in his defence (section 244 Cl.). The Magistrate may, if he thinks fit on the application of either party issue a summons to any witness directing him to attend or to produce any document or other thing. (Section 244 Cl. 2).

The Magistrate may before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court. (Section 244 Cl. 3).

The Magistrate is to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. (Section 355).

If the Magistrate is satisfied that the order is not reasonable and proper no further preceedings shall be taken in the case.

If the Magistrate is not so satisfied the order shall be made absolute.

Jury, Sections 135, 138, 139, 141.

If an application is made for the appointment of a Jury the Magistrate is bound to appoint a Jury forthwith. The order appointing a Jury is to be in terms of Form No. XVII in Schedule V of the Code. The Jury shall consist of an uneven number of persons not less than five.

Of the Jurors the foreman and one half of the remaining members shall be nominated by the Magistrate and the other members by the applicant.

The Magistrate shall summon the foreman and other members.

The time and place of meeting is to be decided by the Magistrate.

The Magistrate shall fix a time within which the verdict must be returned.

Unanimous or majority verdict of the Jury is to be given effect to.

If such verdict is that the conditional order is reasonable and proper the conditional order shall be made absolute.

If the verdict is that the order as originally made would be reasonable and proper if modified in a manner suggested

by the Jury the Magistrate shall, *if he accepts the modification*, make the conditional order absolute subject to the modification.

If the verdict is that the conditional order is not reasonable and proper or if the modification suggested by the Jury is not accepted by the Magistrate the proceedings shall be dropped.

How the Jury is to decide.

It is not laid down how the Jury is to decide the matter. Evidence is to be taken by the Magistrate when the matter is left to be decided by him alone. No question of legal evidence arises when decision by a Jury is sought. Evidently the Jury is to come to a decision by local inspection. There is nothing to prevent the jurors from making any other enquiry which they may like to do. There is no provision however for a local inspection by such a Jury section 539-B being only applicable to cases of inspection by a Judge or Magistrate.

If the applicant by neglect or otherwise prevents the appointment of the Jury or if from any cause the Jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow the Magistrate may pass such order as he thinks fit. (Section 141).

The widest discretion is given to a Magistrate in such a case. The Magistrate may make the conditional order absolute or may modify it in any way he thinks proper. The applicant *i.e.*, the applicant for the appointment of a Jury must have done something whereby such appointment was prevented or the Jury must have failed to return a verdict within the time allowed by the Magistrate in order to give jurisdiction to the Magistrate to dispose of the case under section 141.

Procedure when existence of public right is denied in cases relating to obstruction, nuisance or danger to the public in the use of any way, river, channel or place.

These cases stand on a different footing. There was much controversy as to what the Magistrate should do in such a

case when the existence of the public right was denied. Divergence of opinion called for legislative interference and Section 139-A has been inserted in 1923 to settle the question.

It is incumbent on the Magistrate to question the person against whom the conditional order has been made, when such person appears before him, whether he denies the existence of any public right in respect of the way, river, channel or place.

In case of such denial the Magistrate should at once proceed to enquire into the question of the existence of the public right.

If the Magistrate finds that there is any reliable evidence in support of such denial he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil court.

If he finds that there is no such evidence he shall proceed to take evidence and dispose of the matter or appoint a Jury and refer the matter to them as the case may require.

So far as the question of the existence of a public right is concerned it is settled by the decision arrived at under Section 139-A and cannot be reopened at any subsequent stage of the proceedings whether in the course of evidence or before the Jury.

Procedure subsequent to order being made absolute.

The Magistrate is to give notice of the order absolute to the person against whom it is made and shall further require him to perform the act directed by the order within a time to be fixed in the notice. The Magistrate is further to inform such person that in case of disobedience he will be liable to the penalty provided by section 188 I. P. C. (Section 140).

Sub-section 2 of section 140 provides how the order is to be actually executed if the act required to be done is not performed by the person against whom the order has been made within the time fixed by the Magistrate.

Sub-section 3 gives immunity from prosecution in respect of anything done in good faith in executing the order absolute.

Injunction pending enquiry.

Where in the opinion of the Magistrate immediate measures are necessary to prevent imminent danger or injury of a serious kind to the public the Magistrate may issue such an injunction to the person against whom the conditional order has been made as is required to obviate or prevent such danger or injury pending the determination of the matter by himself on evidence or by the Jury. (Section 142, sub-section 1).

In default of such person forthwith obeying such injunction the Magistrate may himself use or cause to be used such means as he thinks fit to obviate such danger or to prevent such injury. (Sub-section 2, Section 142).

Sub-section 3 gives immunity from prosecution in respect of anything done in good faith by a Magistrate under Section 142.

Power to prohibit repetition or continuance of public nuisance.

A District Magistrate or Sub-Divisional Magistrate or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf may order any person not to repeat or continue a public nuisance as defined in the Indian Penal Code or any special or local law. (Section 143).

The order is to be in terms of Form No. XX in Schedule V of the Code.

CHAPTER XXX.

PUBLIC NUISANCE CONTINUED—ADMINISTRATION OF SEC. 133.

The subject of public nuisance is dealt with in chapter X of the Code from two separate points of view

(*a*) removal of nuisance (Section 133) and

(*b*) prohibiting repetition of nuisance (Section 143).

Conditional order for removal of nuisance.

133. *Whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit,*

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on

business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be, or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do,

to appear before himself or some other Magistrate

of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A 'public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary *or* recreative purposes.

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(1) Scope of section 133.

In proceedings under section 133 of the Code it is necessary to establish first that the act complained of is a nuisance or an obstruction and secondly that it was committed in a public

place which may be lawfully used by the public. (*Beni Prosad Sing* v. *Sarjoo Sing* 20 *Cr. L. J.* 556 *Churaman* v. *Emp.* 12 *A. L. J.* 1024).

The section applies only to an existing physical obstruction or nuisance which is capable of being removed. It cannot be made use of to put a stop to and prohibit, for example, certain objectionable accompaniments to ceremonies practised by a religious act to the discomfort and annoyance of their fellow townsmen. (*King Emp.* v. *Faizl Hasan* 1901 *A. W. N.* 126).

The section deals with the condition of things at the time when the enquiry is held. If at such a time a house or branch of a tree is likely to fall and thereby endager the life of passers-by action might be taken under the section. But it is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. (*Gokul* v. *Emp.* 22 *A. L. J.* 436).

It is questionable whether section 133 is applicable at all where it is not shown that imminent danger to the public is involved (*Mir Iman Abdul Aziz* v. *Q. Emp.* 4 *Punj. Record* 1897 ; *Sheo Sharan Lal* v. *Lal Mohammad* 12 *C. W. N.* 70 where the Punjab case was approvingly referred to by the Sessions Judge in the Letter of Reference the reasons of which were accepted by the High Court).

The Allahabad High Court has however held that obstruction upon a public road is a nuisance within the meaning of section 133 whether in point of fact it causes practical inconvenience or not. (*Q. E.* v. *Kedar* 23-*A* 159).

But in taking action with regard to the nuisance the Magistrate should not lose sight of considerations which ought ordinarily to prevail with public authorities.

Where the subject matter of the proceeding was a solid and vigorous branch of a tamarind tree which was 15 ft. above the level of a country road it was held that an obstruction at the height, having regard to the normal traffic, was not an unlawful obstruction within the meaning of section 133. Even if it could be held that the branch was likely at some time or other and under abnormal circumstances to prove an obstruction it was

not necessary for the Magistrate to go to the extreme length of ordering it to be cut down. (*Gokul* v. *Emp.* 22 *A. L. J.* 436).

In the same case it was pointed out that a tamarind tree was an object of veneration to many Hindus and the safety of the public which after all is what is contemplated by the section would have been adequately secured if the Magistrate had ordered proper support to be given so as to prevent the branch from falling.

In deciding whether or not to apply the section in respect of a trade it is necessary to take all the circumstances into account to see that the interference with public comfort is considerable and that a considerable section of the public is affected injuriously, general equitable principles not being lost sight of.

(2) Person proceeded against if an accused.

A person proceeded against under Section 133 is not an accused person and he commits an offence under Section 193 I. P. C. if he makes a false statement during his examination on oath in the proceedings. (*Hirando Ojha* v. *Emp.* 9 *C. W. N.* 983 *S. C.* 2 *C. L. J.* 149).

(3) Revival of proceedings.

There is no bar in law to the revival of a proceeding under Sec. 133 Cr. P. C. with regard to the same matter which had been previously dropped provided there are materials before the Magistrate upon which *prima facie* he could act. (*Ishan Chandra Chakravarti* v. *Proshanna Kumar Rai* 5 *C. W. N.* 173).

(4) Rescinding order previously made absolute.

An order of a Magistrate rescinding an order absolute previously made under Sec. 139 is not *ultra vires* and cannot be called in question in a civil court. (*Sheonarain Tewari* v. *Sakhi Chand Saha* 18 *Cr. L. J.* 305).

(5) Simultaneous proceedings under Sec. 133 Cr. P. C. and Sec. 283 I. P. C. not proper.

There can be no prosecution under Sec. 283 I. P. C. simultaneously with a proceeding under Sec. 133 Cr. P. C. (*Jitan* v. *Emp.* 1 *Pat. L. T.* 564).

(6) Effect of previous conviction under Sec. 283 I. P. C.

A Magistrate cannot make an order under Sec. 133 relying merely on a conviction of the person under section 283 I. P. C. in respect of the same matter. (*Ramnath Laskar* v. *Jaladhar Shahu* 3 *C. L. J.* 360).

(7) Effect of previous order under Sec. 133.

Even in such a case the procedure prescribed by Sec. 137 Cl. (1) must be followed before making the final order. (*Sarojebashini Debi* v. *Sripati Charan Chowdhury* 42 *Cal.* 702 *S. C.* 19 *C. W. N.* 332).

(8) Alternative remedy if affects Magistrate's Jurisdiction.

The existence of an alternative remedy does not deprive a Magistrate of his jurisdiction under Sec. 133 of the Code. (*Krishna Mohan Banerji* v. *A. K. Guha* 32 *C. L. J.* 42).

(9) Revision by High Court.

Orders in proceedings under Sec. 133 are open to revision by the High Court under Secs. 435, 439.

Before applying to the High Court in revision the applicant should first have moved the Sessions Judge under Secs. 435, 438. (*Rash Behary Saha* v. *Phani Bhushan Haldar* 48 *Cal.* 534).

(10) Public Nuisance.

A common nuisance cannot be excused on the ground that it causes some convenience or advantage to one party. (*Bharosa Pathak* v. *Emp.* 34 *A.* 345 *S. C.* 9*A L. J.* 355).

By efflux of time no prescriptive right can accrue to commit a public nuisance. (*Municipal Commissioners of the Suburbs of Calcutta* v. *Mohamed Ali* 7 *B. L. R.* 499). But the existence of an encroachment for a long time may be taken into account and in a case where (1) the alleged encroachment was in existence for over twenty years at the time the notice was issued it was held that the matter should be left to be decided by the civil court. (*Ram Lakhan* v. *Emp.* 24 *Cr. L. J.* 494).

The section provides for a nuisance being removed from a public place. It has been held that a noise which is injurious to the physical comfort of the community is a nuisance within the meaning of Sec. 133. (*Krishna Mohan Banerji* v. *A. K. Guha* 32 *C. L. J.* 42).

(11) Public right of way.

The fact that the residents of a particular village have a right to take their cattle across a field is not sufficient to constitute a public right of way. (*Jhunnu Sing* v. *King Emp.* 1906 *A. W. N.* 190).

Where the right to put up a bund in a river had been lost by long disuetude and the public acquired a prescriptive right of way through the river the petitioner's act in erecting a bund and making the river unfordable was held to be a public obstruction within the meaning of Sec. 133 Cr. P. C. (*Zaffer Nawab* v. *Emperor* 32 *Cal.* 930).

(12) Public right to river or channel.

A dispute between two villages in respect of the rights of one to dig and clear a water course for irrigation purposes which is denied by the other is a dispute to which Sec. 133 is applicable to avoid a breach of the peace. (*Budha* v. *Mohan Lal* 13 *Cr. L. J.* 594).

Where the inhabitants of one village have placed an unlawful obstruction to prevent the flow of water along its natural channel and the resultant injury affects a large area of cultivated land and a considerable body of persons the case is one of a public nuisance and the Magistrate is justified in removing the obstruction. (*Bharosa Pathak* v. *Emp.* 34 *A.* 345 *S. C.* 9 *A. L. J.* 355).

An order directing the removal of a dam constructed across a public river which amounts to unlawful obstruction of the river and causes damage to the lower riparian owners is justified under Sec. 133. (*Jagannath* v. *Chandrika Prasad* 21 *Cr. L. J.* 55).

The word "Channel" is not defined in the Code but it was held to be wide enough to include a water course carrying water to a public Urani. (*Ramsami Chattear* v. *Ramanathan Chettear* 1925 *M. W. N.* 663).

Where the channel in question is not such as has been or can lawfully be used by the public Sec. 133 has no application. (*Jagar Nath Sahu* v. *Parameshwar Narain* 36 *All.* 209 *S. C.* 12 *A. L. J.* 248).

(13) Conduct of trade or occupation. Brick Making.

Before the amendment of 1923 it was necessary that the trade or occupation should itself be injurious to the health or physical comfort of the community.

In this state of the law it was held that where the objection was to the mode in which petitioners carried on their occupation of manufacturing bricks and not against the occupation itself Sec. 133 did not apply. (*Gokal Chand* v. *Crown* 1 *Lah.* 163).

But the amendment of 1923 has made the conduct of a trade or occupation cognizable and now the facts of the Lahore case referred to above will attract the operation of Sec. 133.

(14) Prostitutes.

The conduct of the trade or occupation must be injurious to the health or physical comfort of the community. The mere existence of houses of prostitutes by the road-side and the fact that they plied their trade in those houses was held not to affect the physical comfort of the passers-by. (*Basanto Baisnabi* v. *Emp.* 5 *C. W. N.* 566).

This was held under the law as it stood before the amendment of 1923 under which the question to be considered was whether the trade or occupation itself was injurious to the physical comfort of the community but now as the section has been worded so as to make the conduct of a trade cognizable Sec. 133 may well apply to prohibit the trade of a prostitute if

the conduct of the trade is objectionable in the sense of being injurious to the physical comfort of the community.

(15) Opening a Market.

It has been held that a person who opens a new market close to an old one cannot by the mere fact of opening such market be said to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community and a Magistrate is not justified in passing an order under Sec. 133 closing the new market. (*Moidin Kutti* v. *Abdulla* 14 *M. L. J.* 207).

In the same case it has been held that even the fact that people from the old market are forcibly dragged from it to the new one will not justify the order under Sec. 133 but now after the amendment such conduct will atract the operation of the section.

(16) Acts done on private property giving rise to public nuisance.

A private proprietor may be guilty of acts done on his private property which may give rise to a public nuisance. (*Indro Nath Banerji* v. *Q. E.* 25 *Cal.* 425).

But it is only the nuisance that can be ordered to be removed and the use of the property otherwise than by creating a nuisance cannot be prohibited (*Indro Nath Banerji* v. *Q. E.*) In connection with bunds it has been held that it is open to a Magistrate under Sec. 133 to order the removal of a bund but he cannot order its reconstruction after its removal. (*Rahimuddi Jamadar* v. *Sher Ali* 40 *C. L. J.* 597).

This is consistent with the general policy of the legislature in relation to the prevention of offences that civil rights should as little be interfered with as possible. The inevitable minimum interference necessary for the prevention of offences is only allowed.

An order directing a party to remove a nuisance from a tank either by re-excavating or by filling it up or by clearing

the water weeds has been held to be a legal order. (*Kiran Chandra Chowdhury* v. *Romesh Ch. Chowdhury* 27 *C. W. N.* 459).

Where a privy was allowed to remain in such a condition as to be a nuisance to passers lawfully using a public place or way it was held that proceedings to cause the nuisance to be abated could be instituted under Sec. 133 but the Magistrate could not order the privy to be removed because it was only recently made in any locality. (*Inre Balaji Narayan* 4 *Bomb. L. R.* 882).

(17) Cremation ground.

The owner of a cremation ground may be held to create a nuisance if he allows the cremation of bodies upon that ground to be so performed as to annoy or endanger the lives and properties of persons living in the neighbourhood.

Such proprietor cannot be said to be carrying on any trade or occupation within the meaning of clause 2 of Sec. 133 and a Magistrate has no power to order the removal of a burning Ghat from its position and to prevent its being used for cremation purposes but he can direct the proprietors to remove the nuisance, *i.e.*, to take such steps as would result in the cremation of corpses causing to be a nuisance to the public.

Although a burning Ghat or cremation ground may not in itself be a "nuisance" within the meaning of Cl. 2 of Sec. 133 still a Magistrate will have jurisdiction to take action under the section if it is shown that such a Ghat or ground is in such an offensive state or that cremation is carried upon it in such an offensive manner as to be a source of injury, danger or annoyance to persons living in the vicinity. (*Indro Nath Banerji* v. *Q. E.* 25 *Cal.* 425).

The case cited above is an authority for the proposition that the nuisance in the burning Ghat can be directed to be removed but Sec. 133 gives no power to the Magistrate to direct the removal of the burning Ghat or to prevent its being used for cremation purposes.

(18) Graveyard.

In conformity with this view it has been held that the use of a graveyard cannot be prohibited under the section. (*Sheo Saran Lal* v. *Mohamad Lal* 12 *C. W. N.* 70).

The Judgment of the High Court in this case is very short. Their Lordships agree with the Sessions Judge in the reasons given by him in the Letter of Reference and set aside the order made under Sec. 133.

They further observe "we do not see how the present case can come under Sec. 133 of the Code. It is not a case of the removal of nuisance from a public place".

It must be pointed out that the case was one for the removal of a nuisance from a public place. There can be no doubt that a public burial ground is a public place and the very first clause of Sec. 133 contemplates the removal of a nuisance from a public place. What was wrong in the case was that instead of making an order for the removal of the nuisance in question (which alone could be legitimately done) against the persons who were causing the nuisance the Magistrate closed the graveyard which he had no power to do. The learned Sessions Judge in his Letter of Reference makes the matter quite clear.

The facts of the case were these—One Sheosharan Lal presented a petition to the Sub-Divisional Magistrate of Dinapur alleging that a Mahomedan graveyard which had existed in a particular locality from time immemorial had become very objectionable from a sanitary point of view, that night soil and refuse were freely deposited on it, that it was used as a public latrine and that pigs of Dosadhas and Domes frequented it in large numbers. In those circumstances the petitioner prayed that the graveyard should be closed and offered to provide another site for the burial of Mahomedan dead in some more suitable place. He at the same time complained of a totally different matter namely the unauthorised extension of the old graveyard so as to encroach upon his land, named thirty six persons as having caused the encroachment in the course of the last eight years and stated that a civil suit on the subject had been lately instituted by him. On

this somewhat confusing petition the Magistrate made an order under Sec. 133 closing the graveyard.

(19) The conditional order.

The conditional order is to call upon the person proceeded against to do the thing required by the Magistrate to be done or if he objects so to do to appear before the Magistrate who makes the conditional order or some other Magistrate of the first or second class at a time and place to be fixed by the order and move to have the order set aside or modified in the manner provided for. The final order made under Sec. 136 (when nothing is done in response to the conditional order) and Sec. 137 (when cause is shown and on taking evidence the Magistrate is satisfied that the conditional order is reasonable) must conform to the conditional order. In such cases the final order cannot he made in a modified form. In cases determined by Jury the Jury may suggest a modification of the conditional order and if the Magistrate accepts the modification he may make the final order in the modified form. The Magistrate can make a modification of the conditional order when he terminates the proceedings under Sec. 141.

An order absolute can be made under Secs. 136, 137 and 139. Sec. 136 contemplates a case where nothing is done in response to the conditional order and Sec. 137 a case when the Magistrate finds on evidence that the conditional order is reasonable. In both those sections there is no mention of the modification of the conditional order by the Magistrate. Under Sec. 139 the Jury can suggest a modification of the conditional order and the Magistrate can make the order absolute in the modified form if only he accepts the modification suggested by the Jury. The acceptance of the modification by the Magistrate is a safeguard provided for by the legislature the general policy followed by which in connection with a proceeding under Sec. 133 is that the order absolute is to be made in the form of the conditional order which has been served on the person proceeded against and which gives him notice as to what he is to do. Save and except in the case of a

modification suggested by the Jury and accepted by the Magistrate the order absolute is to be in the form of the conditional order. It has been held however in *Jhau Lal* v. *Emp.* 23-*A. L. J.* 43 that Sec. 133 does clearly contemplate that in suitable cases the order initially made may be modified and the modified order may be allowed to stand.

(20) Order must not be vague and indefinite.

The order must be such that the persons against whom it is directed can learn from its terms what it is that they are to do for the purpose of complying with it.

Where the conditional order was too vague and indefinite the High Court set aside the final order passed under Sec. 137 and declined to send back the case for retrial on the ground that under the section the Magistrate could only decide on the reasonableness or propriety of the conditional order and was not competent to go behind it (*Kali Mohan Kar* v. *Nakari Chandra Das* 11 *Cal. L. J.* 114).

Where the extent of the encroachment of a house on a public way which was the subject of the proceeding under Sec. 133 was not definitely specified in the order it was held to be bad. (*Blagat* v. *Ram Rup* 21 *C. L. J.* 116). In *Jhau Lal* v. *Emp.* 23 *A. L. J.* 43 where the final order was vague the case was sent back for fresh enquiry.

In a prosecution under Sec. 188 I. P. C. for non-compliance with a conditional order if the order be ambiguous and open to two interpretations the one most favourable to the accused must be adopted. (*Parbutty Charan Aich* v. *Q. E.* 16 *Cal.* 9).

(21) Order absolute must not be made on conditional order passed at a remote distance of time.

Where a conditional order passed in 1916 was made absolute in 1920 the High Court treated the final order as resting on no conditional order and reversed it. (*Inre Rangubai Guru Rao* 23 *Bomb. L. R.* 844).

(22) Service of conditional order.

134. (*1*) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons.

69. (*1*) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(*2*) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(*3*) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency-town, with his servant residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned

ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

A conditional order under Sec. 133 having got to be served under Sec. 134 (1) on the person against whom it is made as a summons the procedure provided by Sec. 71 cannot be made use of unless service in the manner mentioned in Secs. 69 and 70 cannot be effected by the exercise of due diligence.

Where the serving peon's return showed that personal service could not be effected and therefore service was effected by affixing a copy to some conspicuous part of the house but it did not show that service by leaving a copy with an adult male member of the family was impossible it was held that there was no proper service of the conditional order. (*Beni Madhab Sapui* v. *Jadunath Sapui* 31 *C. W. N.* 148).

Steps subsequent to conditional order.

135. The person against whom such order is made shall—

(*a*) perform, within the time *and in the manner* specified in the order, the act directed thereby; or

(*b*) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

(23) Disobedience of conditional order.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute.

Non-performance of the act required to be done by the conditional order alone does not render a person liable to the penalty of Sec. 188 I. P. C. That section can be invoked only when the conditional order is not complied with and no cause is shown and no application is made for the appointment of a Jury.

(24) Cannot both show cause and ask for appointment of Jury.

The person against whom a conditional order under Sec. 133 has been made cannot both show cause and ask for the appointment of a Jury. Sec. 135 gives the person against whom the conditional order is made the right to adopt either of these alternatives. (*Kishori Lal Pauri* v. *Emp.* 13 *C. W. N.* 367).

(25) When cause is shown Magistrate shall take evidence.

137. (*1*) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-cause.

(*2*) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(*3*) If the Magistrate is not so satisfied, the order shall be made absolute.

When cause is shown the Magistrate is bound to take evidence as in a summons case before making the order absolute.

The provisions of Sec. 137 are mandatory and no waiver on the part of the petitioners can confer on the Magistrate authority to act in a manner not prescribed by law. An order under Sec. 133 made upon no legal evidence and based upon information gathered at a local enquiry is illegal although the parties may have consented to such an irregular procedure. (*Upendro Nath Mandal* v. *Rampal* 10 *Cal. L. J.* 482 ; *Rai Mohan Karmaker* v. *Emp.* 44 *Cal.* 61 *S. C.* 20 *C. W. N.* 1171 ; *Emp.* v. *Balbhadra Prossad* 1 *Pat. L. W.* 292 *S. C.* 18 *Cr. L. J.* 448 ; *Beni Thakur* v. *Gokul Raut* 20 *Cr. L. J.* 217 ; *Ram Mondal*

v. *Chandra Mondal* 21 *C. W. N.* 926 ; *Daraswami Mudaliar* v. *Sudaksana Mudaliar* 17 *M. L. T.* 142).

The Magistrate cannot make the conditional order absolute by relying on the result of his own enquiry or by substituting his own evidence for that adduced by the parties. (*Kali Saday Ghosh* v. *Sidheswar Banerji* 23 *C. W. N.* 1054).

(26) Order made on report of another Magistrate.

An order made without taking evidence but on the report of another Magistrate after enquiry is illegal (*Inre Kariyappa Ningappa* 47 *Bomb.* 89 ; *Ismail* v. *Bunda* 20 *A. L. J.* 697). These cases condemn the procedure in question where the person served with the conditional order appears before the Magistrate who drew up the proceedings and the case is then referred to another Magistrate for report but where the Magistrate by his conditional order requires the person proceeded against to appear before another Magistrate by whom should the case be disposed of? If the appointment of a Jury is to be asked for the application must be made to the Magistrate who drew up the proceeding. If cause is shown it can be done before the Magistrate to whom reference is made in the conditional order and this Magistrate should take evidence under Sec. 137 and decide the case. It has however been held that on the report of such Magistrate made after taking evidence the Magistrate who drew up the proceeding can make the final order. (*Chandrika Koeri* v. *Budhu Dosadh* 24 *Cr. L. J.* 690).

An order made by the Magistrate after local enquiry on the application of the parties asking him to arbitrate is illegal. (*Ram Mandal* v. *Chandra Mandal* 21 *C. W. N.* 926 *S. C.* 25 *C. L. J.* 349).

(27) Evidence must be taken even before dropping proceedings.

Before making an order under clause (2) of Sec. 137 the Magistrate must take evidence. (*Shew Kelaon Ram Kalwar* v. *Nayan Bepari* 22 *Cr. L. J.* 239).

(28) Arbitration, legality of.

There is no provision for arbitration in a case under Sec. 133. (*Raja Belam Rai* v. *Nawlaksing* 22 *Cr. L. J.* 327 ; *Ajit Shekh* v. *Jamatullah Tarafdar* 22 *Cr. L. J.* 511).

(29) Opportunity to produce evidence.

Reasonable opportunity should be given to adduce evidence. (*Rai Mohan Karmakar* v. *Emp.* 44 *Cal.* 61 *S. C.* 20 *C. W. N.* 1171).

Opportunity to cross-examine.

The Magistrate must not arbitrarily fix an unreasonably short time for the cross-examination of a witness (*Emp.* v. *Abed Ali* 34 *Cal. L. J.* 172).

(30) Evidence to be taken as in a summons case.

The complainant has to begin by adducing evidence and then the party showing cause may produce his own evidence if so advised and when this has been done but not before the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. (*Hingu* v. *King. Emp.* 6 *A .L. J.* 685 *S. C.* 31*A* 453 *Dakshinamurti* v. *Emp.* 18 *Cr. L. J.* 848 ; *Indar* v. *Emp.* 11 *A. L. J.* 931 *S. C.* 15 *Cr. L. J.* 28 ; *Bechan Teli* v. *Emp.* 47 *All.* 341).

The procedure for summons cases relating to evidence is to be found in Secs. 244, and 355. The Magistrate shall hear the complainant, *i.e.*, the person on whose application the proceeding was started and take all such evidence as may be produced by him and also hear the party proceeded against and take all such evidence as he produces in support of his case. He is to take this evidenc into consideration as also any evidence which he may cause to be produced of his own motion under Sec. 540.

The Magistrate is to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. (Sec. 355).

(31) Order on evidence of opposite party only.

An order without taking any evidence for the petitioner but after taking only the evidence for the person proceeded against is bad (*Emp.* v. *Sita Ram* 18 *Cr. L. J.* 888).

If neither party adduces evidence.

If neither party adduces evidence the order cannot be made absolute (*Becham Teli* v. *Emp.* 47 *All.* 341).

(32) Appointment of Jury.

138. (*1*) On receiving an application under section 135 to appoint a Jury, the Magistrate shall—

(*a*) forthwith appoint a Jury consisting of an uneven number of persons not less than five, of whom the foreman and one half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(*b*) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(*c*) fix a time within which they are to return their verdict.

(*2*) The time so fixed may, for good cause shown, be extended by the Magistrate.

The application for the appointment of a Jury must be made to the Magistrate who made the conditional order even if in that order the person proceeded against is called upon to appear before some other Magistrate. On an application for the appointment of a Jury the Magistrate who made the conditional order must follow the procedure laid down in Secs. 138, 139. He must terminate the proceedings himself and there is no provision for transferring them to some other Magistrate.

Where on receipt of the verdict of the Jury the Magistrate who made the conditional order transferred the case to another

Magistrate it was held that the procedure was contrary to law inasmuch as the former Magistrate alone was competent to deal with the case. (*Angappa Mudali* v. *Perummal Chetty* 37 *M. L. J.* 313).

On receiving an application for the purpose the Magistrate is bound to appoint a Jury. He has no option in the matter. The Magistrate shall forthwith appoint a Jury. The Magistrate's order constituting a Jury is to be made as laid down in Form No. 17 of Schedule V of the Code. The appointment of the Jury must be made in strict compliance with Sec. 138. The foreman and at least one half of the remaining Jurors are to be nominated by the Magistrate and the others by the applicant for the appointment of a Jury, *i.e.*, the person proceeded against in the proceeding under Sec. 133. The person on whose application the proceeding has been started, the complainant so to say, has no *locus standi* so far the selection of the Jurors is concerned.

The Magistrate should see that friends or supporters of the petitioner are not nominated. (*Far Zand Ali* v. *Hakim Ali* 37 *All.* 26 *S. C.* 12 *A. L. J.* 1241).

As pointed out by Sir Henry Thoby Prinsep in his commentary, it would be well if the Magistrate warned the Jurors that they should hold their proceedings together and arrive at their verdict in consultation, for in several reported cases orders based on reports of Jurors have been set aside on this ground. So if an inspection of the locality be made it should be made by all the Jurors together and not by each of the Jurors separately.

It is desirable that before the appointment of a Juror the Magistrate should learn whether the person to be appointed will serve for he has no power to compel service. He may probably substitute another Juror for one who will not serve or who is in some way incapacitated from serving.

(33) Evidence before Jury.

There is no special procedure laid down in the Code to be adopted by a Jury appointed under Sec. 138 in coming to a

finding on the questions submitted to them. (*Emp.* v. *Ram Bilas* 30*A* 364 *S. C.* 6 *A. L. J.* 488).

The Jury appointed under Sec. 138 are simply persons selected by the parties to determine in an informal way whether the order as passed by the Magistrate is or is not reasonable. (*Dulal Ram Dev* v. *Baisnab Bhusan Deb* 10 *C. W. N.* 845).

Evidence to be taken and parties to be heard.

When a case is referred to the Jury the Jury are bound to hear the parties and such witness as they may desire to be heard. (*Mahomed Ashraffuddin* v. *Shirk Karim Buksh* 18 *C. W. N.* 1148).

A verdict of the Jury without taking evidence but given on mere local inspection is illegal. (*Adhar Chandra De* v. *Ambika Charan Roy* 6 *C. W. N.* 886).

(34) Report of the Jury.

All the Jurors must work together to investigate the matter. Any one is at liberty to differ from others and express a dissentient view.

Where four out of five Jurors were present at the time of the investigation the report was held to be illegal and it was pointed out that in such a case the Magistrate should allow the proceedings to go on with a fresh Jury. (*Srimati Dasya* v. *Nibaran Chandra Ghosh* 24 *C. W. N.* 928 *S. C.* 31 *C. L. J.* 371).

The report of a Jury directing the parties to perform certain acts which has been adopted by the Magistrate can only be enforced in the manner provided for in Cl. (2) of Sec. 140 and cannot be specifically enforced in a civil court on the basis of a contract between the parties nor will a suit for compensation lie for breach of the order. (*Sheonaranin Tewari* v. *Sakhi Chand Sahu* 18 *Cr. L. J.* 305).

Splitting up verdict.

Where in a proceeding under Sec. 133 the verdict of the Jury provided firstly for the removal of the bond and secondly for its reconstruction it was held that the Magistrate could not split up the verdict

so as to give him jurisdiction to deal with the matter. (*Rahimuddin Jamadar* v. *Sher Ali* 40 *C. L. J.* 597).

(35) Omission to return verdict.

In case the Jury fail to return their verdict within the time allowed by the Magistrate the latter may under Sec. 141 pass such order as he thinks fit and the order so passed shall be executed in the same manner as an order absolute otherwise provided for in Secs. 136, 137 and 139.

Discretion is given to the Magistrate to pass any order he thinks proper. He may make the conditional order absolute in its original or in a modified form but he cannot drop the proceedings. The words of Sec. 141 " the Magistrate may pass such order as he thinks fit and such order shall be executed in the manner provided by Sec. 140 " negatives the idea of the Magistrate dropping the proceedings.

The words have however been interpreted to mean that the Magistrate must enquire into the matter before he passes an order and that he cannot do so without investigation and without affording the person proceeded against the opportunity of showing cause. (*Ajodhya Tewari* v. *Emp.* 24 *Cr. L. J.* 583).

It has been held that where the verdict does not come in time and the petitioner appears before the Magistrate and asks for the appointment of a fresh Jury it would be an improper exercise of the Magistrate's discretion not to allow the prayer. (*Shib Chandra Gossain* v. *Hriday Chandra Dass* 12 *C. W. N.* 1047). It has also been held that in such a case the person proceeded against should be allowed to revert to the procedure of showing cause. (*Jib Lal Teli* v. *Gena Sahu* 24 *Cr. L. J.* 492).

Where some of the Jurors refused to return a verdict at all and the Magistrate stopped further proceedings under clause 2 of Sec. 139 it was held the correct procedure for the Magistrate was to appoint a fresh Jury. (*Girwar Lal* v. *Banshidhar* 44*A* 575 *S. C.* 20 *A. L. J.* 472).

(36) Procedure where public right is denied.

Procedure where existence of public right is denied.

139A. (1) *Where an order is made under Sec. 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall before proceeding under S. 137 or S. 138 inquire into the matter.*

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and if he finds that there is no such evidence, he shall proceed as laid down in Sec. 137 or Sec. 138 as the case may require.*

(3) *A person who has, on being questioned by the Magistrate under Sub-Sec. (1) failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial nor shall any question in respect of the existence of any such public right be inquired into by any Jury appointed under Sec. 138.*

This was a subject on which there was much controversy under the Code as it stood before the amendment in 1923. A Full Bench of the Calcutta High Court considered this matter in *Ram Sagar Mondal* v. *Alek Naskar* 26 *C. W. N.* 442 *S. C.* 35 *C. L. J.* 247 *S. C.* 49 *C.* 682 and the opinions expressed by

the learned Judges made it abundantly clear that the interference of the legislature was necessary. The legislature has now added Sec. 139A and laid down in express terms what is to be done in such a case.

Sec. 133 speaks of the prevention of an unlawful obstruction or nuisance from any way, river or channel which is or may be lawfully used by the public or from any public place. Sec. 139-A contemplates a case where a conditional order is made for the purpose of preventing obstruction nuisance or danger to the public in the use of any river or channel or place.

(37) Magistrate shall question.

In such a case when the person proceeded against appears before the Magistrate drawing up the order or the Magistrate to whom he is referred by the former Magistrate, the Magistrate shall ask the person proceeded against whether he denies the existence of a public right in respect of the way, river channel or place in question.

It does not make any difference whether the person proceeded against appears to show cause or to ask for the appointment of a Jury. The provision of Sec. 139-A is imperative. (*Raghu Nath Upadhia* v. *Emp.* 23 *A. L. J.* 187).

The Magistrate should not wait till the party raises the objection. He is to put the question to the party himself and if the public right is denied he is to make an enquiry as provided by the Code. (*Shekh Sadir* v. *Sabarali* 29 *C. W. N.* 649).

If the person proceeded against denies the existence of the public right the Magistrate must, before proceeding any further whether for the purpose of taking evidence where cause has been shown or for the purpose of appointing a Jury where such appointment has been asked for, enquire into the question of the existence of a public right. The manner of enquiry is not laid down. The procedure laid down in Sec. 137 as to the taking of evidence as in a summons case does not apply to this enquiry. It must however be a judicial enquiry in which evidence is to be taken on oath. The procedure must be that the party denying the existence of the public right will adduce

evidence in support of his denial and to rebut this the other side on whose application the proceeding has been drawn up will adduce his evidence, each party's witness being cross-examined by the other.

(38) Reliable evidence in support of denial.

Clause 2 of Sec. 139-A is very important. If the Magistrate finds that there is any *reliable evidence* in support of such denial he shall stay the preceedings *until the matter of the existence of such right has been decided by a competent civil court.*

The Magistrate has got to stay his hands at once and he has got to do it if there is any reliable evidence in support of the denial. It is not required that the non-existence of the public right should be proved to demonstration. It is enough if some reliable evidence has been adduced by the person proceeded against in support of the denial of the existence of a public right. The Magistrate has got to stay his hands on much less than the proof of an assertion in a judicial proceeding in the manner required by the law of evidence. The scope of the provision contained in Sec. 139-A has been thus stated. "The section requires evidence and not proof that no public right exists. The only condition is that upon the materials before him the Magistrate shall have no reason to think the evidence false."

The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans. (*Thakur Sao* v. *Abdul Aziz* 4 *Pat.* 783).

In a case where proceedings were taken for encroaching on and obstructing a public drain the person proceeded against produced a Settlement record showing that the land in dispute belonged to him. It was held that the Criminal Court should stay proceedings and leave the parties to have their right decided in a civil court. (*Debendra Nath Choudhury* v. *Chairman Local Board, Asansol* 25 *Cr. L. J.* 1080).

The object of the legislature is to exclude such cases from the operation of Sec. 139-A in which as was held in several reported cases, the claim of right set up in answer to a public

right is a mere pretence. The Magistrate has clearly no jurisdiction to proceed in a case in which it is doubtful whether public right exists or not. As has been held the existence of a genuine dispute as to title suitable for decision by the civil court is a sufficient ground for holding that the conditional order is not reasonable and proper. (*Bhgwan Das* v. *Emp.* 24 *Cr. L. J.* 635).

(39) Shall stay the proceedings.

The Magistrate shall stay the proceedings. There the Magistrate's duty ends. It is no part of his business to ask one party or the other to go to the civil court.

(40) Until determination by the Civil Court.

The proceedings shall be stayed until the determination of a competent civil court as to the existence or otherwise of the public right is obtained by either party. The duration of the stay order is not limited in any other way. It is not competent for the Magistrate to ask the parties to go to the civil court within a fixed time. If neither party goes to the civil court the stay order holds good for ever.

The question arises whether in a case where neither party goes to the civil court and consequently the stay order remains operative the Magistrate is competent under any circumstances to draw up fresh proceedings under Sec. 133 inrespect of the same way river, channel or place. The proper answer seems to be in the negative.-

(41) Denies the existence of any public right.

The words used in Sec. 139-A are " denies the existence of any public right." Does it mean " denies the existence of the public right for the protection of which the proceeding has been drawn up? Perhaps it does. But it may be interpreted so as to mean any public right, the one set up in the proceeding or any other. It is quite conceivable that the proceeding relates to a particular public right and the person proceeded against denies the existence of that particular public right

while admitting the existence of some other public right in respect of the way, river or channel.

(42) Execution of order absolute.

A Magistrate cannot refuse to enforce his prodecessor's order on the ground that it was not legal. (*Kiran Chandra Chowdhury* v. *Ramesh* Ch. *Chowdhury* 27 *C. W. N.* 459).

(43) Disobedience of order absolute.

The person proceeded against may be prosecuted under Sec. 188 I. P. C. and the Magistrate may cause the thing required to be done by the order to be performed and the costs realised in the manner laid down in sub-Sec. 2 of Sec. 140. Both the consequences may flow simultaneously.

Sub-Sec. 1 of Sec. 140 enjoins that in giving notice of the order absolute to the person proceeded against the Magistrate shall inform him that in case of disobedience he will be liable to the penalty prescribed by Sec. 188 I. P. C. This is a mandatory provision of law and the Magistrate is bound to follow it. Supposing however that in the notice under Sec. 140 there is an omission as to the liability to the penalty under Sec. 188 I. P. C. is a prosecution under the substantive provision of law any way affected?

Under Sec. 188 whoever knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management disobeys such direction shall be punished. Disobedience of an order absolute made under Sec. 136 or 137, or 139 is punishable under Sec. 188 I. P. C. but Sec. 140 which finds a place in the law of procedure governing trials in criminal cases lays down among other things that in every case after the order absolute is made the Magistrate shall inform the person against whom the order is made, that in case of disobedience he will be liable to the penalty provided by Sec. 188 I. P. C. If this mandatary provision of law is not followed by the Magistrate the accused should be allowed to

successfully plead this in defence as a bar to a prosecution under Sec. 188 I. P. C.

It is noteworthy in this connection that Form No. XVIII of Schedule V of the Code is not sufficiently general for the purposes of Sec. 140. It only applies to cases where a Jury has been appointed and the order absolute has been made under Sec. 139 but under Sec. 140 the notice is to be given alike in cases under Secs. 136, 137, 139.

(44) Procedure on failure to appoint Jury or Omission to return verdict.

Besides Secs. 136, 137, 139, Sec. 141 authorises the Magistrate to make a final order where the appointment of a Jury has been prevented by the applicant by neglect or otherwise or the Jury did not return their verdict in time.

The Magistrate may pass such order as he thinks fit.

(See note earlier under heading Omission to return verdict).

The order is to be executed in the manner provided by Sec. 140, *i.e.*, both Sub-secs. 1 and 2.

(45) Injunction pending enquiry.

This is previded for in Sec. 142 and the object is to prevent imminent danger or injury of a serious kind to the public.

Form No. XIX in Schedule V of the Code is the form prescribed for an injunction under Sec. 142 but it is inconsistent with the section itself. The form contemplates a case where a reference has been made to a Jury but the section is clear as to the competence of the Magistrate to issue an injunction "whether a Jury is to be or has been appointed or not." The form would indicate that no temporary injunction can be made when the case is to be decided on evidence by the Magistrate himself and also that the injunction can be issued only after the appointment of a Jury in a case to be decided by a Jury but this is contrary to the section.

(46) Prohibiting repitition or continuance of public nuisance.

143. A District Magistrate or Sub-Divisional Magistrate or any other Magistrate empowered by the

Local Government or the District Magistrate in this behalf may order any person not to repeat or continue a public nuisance as defined in the Indian Penal Code or any special or local law.

No proceeding is necessary to be drawn up as under Sec. 133 and no enquiry is necessary to be held as in relation to a proceeding under Sec. 133.

It is enough if the Magistrate is satisfied as to the nuisance in question being a public nuisance and the responsibility of the person against whom the order is to be made in respect of that nuisance. The Magistrate may come to his decision on those points unfettered by any rule of procedure.

Disobedience of an order is punishable under Sec. 188 I. P. C.

Under Sec. 268 a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

An order under Sec. 143 could not be revised by the High Court under Secs. 435, 439 before the amendment of the Code in 1923. But Sub-sec. 3 of Sec. 435 having been repealed by Act XVIII of 1923 an order under the section is now open to ordinary revision as much as an order under Secs. 144 and 145.

It may be contended that an order under Sec. 143 which does not necessitate the holding of any kind of judicial enquiry is an executive order and not open to revision but the fact that such an order was placed on the same footing with orders under Secs. 144 and 145 when they were excluded from the operation of Sec. 435 in 1898 and again placed within the scope thereof in 1923 when sub-Sec. 3 of Sec. 435 was repealed negatives such a view.

Moreover the idea of executive orders being made under the Code which lays down the law for the guidance of Magis-

trates and Judges in judicial proceedings has not found favour with any court and is inconsistent with the general policy of the legislature.

Lastly the arm of the High Court is long enough to reach any kind of wrong either under the Code of Criminal Procedure or under the Government of India Act.

CHAPTER XXXI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

144. (*1*) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate, (*not being a Magistrate of the third class*), specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section, and* immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(*2*) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may *either on his own motion or on the application of any person aggrieved* rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and shewing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.*

(6) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

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Historical note.

Sec. 62 of Act XXV of 1861 the first Code of Criminal Procedure embodied in itself the general principle of the present section 144 of the Code.

In Act X of 1872 the notable addition that was made in the corresponding section, section 518, was the explanation to that section which was as follows:—

"This section is intended to provide for cases where a speedy remedy is desirable and where the delay which would be occasioned by a resort to the procedure contained in Sec. 521 (which corresponds to the present section 133) and the next following sections would in the opinion of the Magistrate occasion a greater evil than that suffered by the individual upon whom the order was made or would defeat the intention of the chapter."

This explanation which was added in 1872 may still be taken to indicate the distinction between Secs. 133 and 144 of the Code.

The scope of the order was from the beginning to direct a person to abstain from a certain act or take certain order with certain property in his possession or under his management.

The provision as to an order being in force for two months only was added for the first time in Act X of 1882 in Sec. 144.

In the Code of 1898 (Act V of 1898), Sec. 144 was exactly the same as in the Code of 1882.

In 1923 the power to make an order under the section has been taken away altogether from Magistrates of the third class

and it has been enjoined that the Magistrates mentioned in the section are to move only when "there is sufficient ground for proceeding under this section."

The addition of these words is consistent with the policy of the legislature generally followed in 1923 as is manifest from the amendment of Sec. 144 and Secs. 107 and 108 by the addition of words to the effect that the Magistrate is to act only when there is sufficient ground for proceeding.

It is difficult to make out what practical change the addition of the words in question brings about. Why should a judicial officer act unless there is sufficient ground for proceeding and what additional check on the exercise of the Magistrate's power is provided for by the addition of the words in question? (See note under Sec. 107).

Clause 4 has been altered so as to permit the rescinding of an order by a Magistrate *"either on his own motion or on the application of any person aggrieved."*

Clause 5 is new and lays down that the applicant for the cancellation of an order must be given a hearing before the Magistrate disposes of the application.

When the draft bill of 1923 was circulated and public opinion was invited suggestions were made from influential quarters for the amendment of Sec. 144 so as to make the section inapplicable for the purpose of directing a person to abstain from a lawful act. The legislature however did not think it expedient to give effect to the suggestion and it remains as before lawful for a Magistrate to prohibit the doing of a lawful act.

Applicability of the Section.

Section 144 applies to Presidency Towns. If a Magistrate not authorised by law in that behalf makes an order under the section his proceedings are void. (Sec. 530, Cl. (*i*)).

(2) Scope of the Section.

" In a matter which can be dealt with under Sec. 133 as well as under Sec. 144 the Magistrate is bound to proceed

under Sec. 133 unless it can be shown that immediate prevention or speedy remedy is desirable."

The order may be (1) to restrain an interference with lawful acts or (2) it may be to restrain a person in exercise of his lawful right but a Magistrate can so act only where "immediate prevention or speedy remedy is desirable." (Prinsep's Commentary 14th edition).

"Where a breach of the peace is apprehended although the Magistrate in a case of emergency can pass an order *ex parte* directing a party to abstain from an act which may cause such breach still if it is found that a person is doing what he is legally entitled to do and that his neighbour chooses to take offence thereat so as to create a disturbance it is clear that it is the duty of the Magistrate not to deprive such a person of the exercise of his legal rights but rather to restrain the latter from an illegal interference therewith." (Prinsep's Commentary 14th edition).

The above observation of Sir Henry Prinsep has been adopted in *Blong* v. *Emperor* 1924 *Patna* 767.

It is the first duty of a Magistrate to secure to every person the enjoyment of his rights under the law and by measures of protection to deter those who seek to invade the rights of others but if he apprehends that the lawful exercise of a right may lead to civil tumult and he doubts whether he has a sufficient force available to repress such tumult or to render it innocuous regard for the public welfare is allowed temporarily to interdict the exercise. The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority. (*Muthialu Chetty* v. *Bapun Saib* 2 *Mad.* 140).

"The law rightly gives a very wide discretion to the Magistrate in matters affecting the public tranquillity. The powers vested in the Magistrate by this section are not confined to acts and modes of enjoyment of property only which are in themselves unlawful. Not only do the actual words of the section not support such a restricted construction but the adoption of such a line of argument would inevitably lead to the most dangerous consequences. A particular act or a parti-

cular mode of enjoyment of property might be perfectly innocent and lawful in itself but the act may be done or the property enjoyed in that particular mode under circumstances calculated to lead to a serious breach of the peace attended with loss of human life. It is quite within the Magistrates' power under the section to modify any one's right to enjoy his own property at least for a temporary period by imposing upon the owner of the property such conditions as the Magistrate after taking into consideration the facts and surrounding circumstances of each case shall consider necessary to prevent obstruction, annoyance, etc. Every individual right is to a certain extent subject to the general interest of society." (Fendall Currie—Code of Criminal Procedure, 1872).

The Magistrate is to move when (*a*) there is sufficient ground for preceeding under the section and (*b*) immediate prevention and speedy remedy is desirable and (*c*) and order under the section is likely to prevent or tends to prevent obstruction, annoyance, etc.

These three conditions must be fulfilled.

The material facts of the case must be stated in the order on the face of which it must appear that the three conditions mentioned above are fulfilled.

The order may direct any person to abstain from a certain order with certain property in his possession or under his management.

It is the abstention from a certain act that is contemplated and not the doing of any act.

The person to whom a direction can be issued under the section must be *sui juris*. (See *Golam Mohamad* v. *Bhuban Mohan Moitra* 2 *C. W. N.* 422).

It has been stated above that Sec. 144 ought not to be invoked when the situation can be met under Sec. 133 but the latter does not apply to Presidency Towns and so far as these towns are concerned Sec. 144 must be given a wider scope at least when the provisions in the Police Acts are found to be insufficient so as to include cases which in the Muffussil would more appropriately come under Sec. 133. In cases involving land disputes the generally accepted view is that Sec. 145 is

more appropriate but Sec. 145 has no application in Presidency Towns and in such areas Sec. 144 on occasions of emergency must be held to be applicable in cases in which, in the Muffussil, Sec. 145 would be more appropriate.

(*a*) Civil right to be respected.

The Magistrate will not be justified in adjudicating upon the rights of parties and assuming the functions of a civil court. (*Umatul Falima v. Nemai Charan Banerji* 32 *Cal.* 154).

In dealing with the civil rights of a subject it is incumbent on the Magistrate to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient enquiry as to whether the act prohibited as likely to cause a breach of the peace is within or in excess of the legal rights of the person forbidden to do it, and if necessary to deal with the case under the other provisions of the Code which enable him to meet cases of probable breach of the peace. (*Abdool* v. *Lucky Narain* 5 *Cal.* 132 *Per Ainslie J.*).

(*b*) Restraint of private right.

"The law allows an order to be passed in restraint of the exercise of private rights "to prevent danger to human life, health or safety" but a Magistrate would rarely act in such a case under Sec. 144 for he is to act only where "immediate prevention or speedy remedy is desirable". Ordinarily such a matter would be more properly dealt with under Sec. 133 in which the procedure is not summary as that under Sec. 144 and the final order is not like an order under Sec. 144 only of temporary effect. If however such a matter is dealt with under Sec. 144 the Magistrate should be careful to satisfy himself that it is a proper order that is one within his jurisdiction under Sec. 144." (Prinsep's Commentary 14th edition).

If a Magistrate apprehends a breach of the peace he can restrain temporarily the exercise by any private persons of his lawful rights if the prevention of the apprehended breach requires such order under section 144.

An order cannot be passed prohibiting a person from collecting rents from tenants. (*Prem Chand Sing Roy* v. *Dharam Das Singh Roy* 9 *C. W. N.* 392).

An order for division of crops between the tenants and a rival landlord does not come within the purview of Sec. 144. (*Umatul Fatima* v. *Nemai Charan Bannerji* 32 *Cal.* 154).

An order regulating the boat traffic at a certain landing place on the ground that the evercrowding of boats was dangerous to the health of the residents of the town purporting to be passed under Sec. 144 is not one that comes within the purview of the section. (*Empress* v. *Protap Chandra Ghosh* 2 *C. W. N.* 593).

(*c*) Order not to be made contrary to civil court decree.

An order under Sec. 144 made or affirmed contrary to an existing decree of the civil court in respect of the same lands is illegal (*Rooplal Das* v. *David Manook* 2 *C. W. N.* 572; *Gobinda Sahai* v. *Messrs. Sims and Carruthers* 6 *C. W. N.* 466). Where the dispute was between a landlord and a tenant and the landlord obtained a decree for Khas possession in respect of such lands as had been leased to the tenant, the fact that the landlord was unable to point out the particular lands of which he had obtained possession under the decree does not justify an order under Sec. 144 to keep the landlord out of such possession, it being on the tenant to show under the circumstances what lands he held from the landlord. (*Gobindo Sahai* v. *Messrs. Sims and Carruthers* 6 *C. W. N.* 466).

(*d*) Order not to be made so as to interfere with the execution of a civil court decree.

The Magistrate cannot under the section make an order which would have the direct effect of interfering with the execution of a decree of a civil court. (*In the matter of the petition of Rahamat Ullah* 17 *All.* 485 *F. B.*).

In the view of Sir Henry Prinsep as expressed in his Commentary there may be circumstances justifying the making of

an order under Sec. 144 which temporarily would have the effect of interfering with the execution of a decree made by a civil court.

Referring to the Talla riots Sir Henry observed in his Commentary—"The Magistrate may have good reasons to apprehend a serious disturbance of the public tranquillity such as took place in the suburbs of Calcutta comparatively recently when in execution of a decree an attempt was made to take possession of land which was claimed to have been used as a Mahomedan place of worship and was therefore regarded as desecration. In such case if the Magistrate has failed to induce the decreeholder to abstain from enforcing his decree until the excitement has ceased or the police are able to assist him the Magistrate would probably be competent to pass an order under Sec. 144 to have effect until such time as arrangements had been made for preventing the danger."

(*e*) Protection of property or the prevention of pecuniary loss not the legitimate object of the section.

An order under the section can only be made where it is necessary to prevent obstruction, annoyance or injury to the person or injury to human life, health or safety or a riot or affray.

It cannot be made merely for the protection of property. (*In the matter of Prayag Sing* 9 *Cal.* 103).

The section cannot apply to a case where the object of the order appears to be merely to prevent pecuniary loss to the opposite party.

The proper remedy in such cases is a civil suit and an interlocutory injunction. (*Ramauter Sahu* v. *Kishon Put Ram Chaubey* 13 *C. W. N.* 189).

An order under the section restraining raiyats from reaping crops sown by them for securing payment of rent to Government or landlord is illegal. (*Isab Mandal* v. *Emperor* 8 *C. W. N.* 373).

(f) Section not to be invoked to settle question of disputed possession.

The proper procedure to be adopted by the Magistrate in such a case is to pass an order in a proceeding under Sec. 145. (*Parkar Mahton* v. *Ram Khelwan* 11 *C. W. N.* 271).

Where necessary the Magistrate should attach the land under Cl. 4 of Sec. 145 instead of issuing an injunction under Sec. 144 prior to taking such proceedings. (*Jayanti Kumar Mukherji* v. *I. B. Middleton* 4 *C. W. N.* 562).

There is a cardinal difference between a proceeding under Sec. 144 and that under Sec. 145. The former has nothing to do with the question of possession, it relates only to a temporary order in emergent cases of apprehended danger while the latter on the other hand relates to a dispute concerning possession over land or water. (*Jhaman Mahton* v. *Thakuri Mahton* 1 *Pat. L. T.* 369).

The Burma Court has held that a Magistrate can proceed under Sec. 144 where one of the rival parties is found to be in actual possession of the land but except in cases of grave emergency Sec. 145 is the proper section under which to act. (*Nga po Hmi* v. *Mi Shwe Tha* 18 *Cr. L. J.* 967).

The Patna High Court took the view in a series of cases that Sec. 144 can only apply where there is no dispute as to possession. In *Banshi Sing* v. *Emp.* 3 *Pat. L. W.* 353 it was held that if the Magistrate was satisfied that one of the parties was in possession and there was an imminent danger of a breach of the peace it was incumbent on him to restrain the opposite party by an order under Sec. 144. In *Gan Pat Sing* v. *Emp.* 3 *P. L. J.* 287 it was held that where it was clear from a perusal of the police report that the claim of the party disturbing the peace was a mere pretence a Magistrate was justified in acting under Sec. 144. The matter ultimately came up before a Full Bench of that Court consisting of Dawson Miller C. J., Mullick J. and Jawala Prosad J. (*Sheobalak Singh* v. *Kamaruddin Mandal* 23 *Cr. L. J.* 549) and it was held that the existence of a dispute regarding possession does not oust the Magistrate's jurisdiction under Sec. 144 and where the dispute is not really *bona fide* and

speedy remedy is desirable an order under Sec. 144 can be properly made.

A strongly constituted Full Bench of the Calcutta High Court had occasion to consider the question whether the existence of a dispute concerning land deprived the Magistrate of jurisdiction under Sec. 107 and the question was answered in the negative (*Abbas* 39 *Cal.* 150). The legislature has in 1923 given effect to the decision of the Full Bench by the addition of Cl. 10 to Sec. 145. But the question as to the effect of the existence of a dispute concerning land on the applicability of Sec. 144 was not considered by the Full Bench and was not raised before it.

It must be remembered that Sec. 145 has no application in Presidency Towns and in such areas Sec. 144 must be held on occasions of emergency to include within its purview cases in which in the Muffassil Sec. 145 would be more appropriate.

(3) Urgent cases of nuisance.

The section is intended to be applied as a temporary measure in urgent cases of nuisance. Can the section be invoked as a remedial measure in the case of a longstanding nuisance?

In *Cawashjii Jehanger Inre* 22 *Bomb. L. R.* 157 Shah J. held as follows:—

"Where the nuisance complained of has existed for a great length of time practically without any complaint it cannot be treated as an urgent case of nuisance or apprehended danger within the meaning of Sec. 144. The scheme and the provisions of that section show that it is meant to provide for a temporary remedy to meet an emergency and that it applies to cases where a temporary order in the nature of things would be appropriate and would afford a reasonably adequate relief under the circumstances of the case".

But in the same case Hayward J. observed:—

"It is not possible to hold that a temporary order ought not to be passed merely because the dispute demanded a permanent injunction for final settlement. Where the circum-

stances are such as to create an emergency requiring an immediate order to prevent a disturbance of the public tranquillity such an order can be passed under the section though the dispute is one which might have to be settled only by a permanent injunction".

Immediate prevention or speedy remedy.

The necessity of immediate prevention or speedy remedy is the foundation of the Magistrate's jurisdiction.

When he has made up his mind that such necessity exists he must state the material facts in his order. (*Karoolal Sajawal* v. *Shyam Lal 32 Cal. 935 S. C. 9 C. W. N. 864 S. C. I. C. L. J.* 216: *Venkata Raman Ayar* v. *Emp.* 1917 *Mad. W. N.* 721; *Goovind Chetty* v. *Emp. 27 Mad. L. J. 628*).

A mere statement by the Magistrate that he considers the case to be urgent is not sufficient to give him jurisdiction if the facts set out by him show that in reality there is no urgent necessity for action. (*Chandra Nath Mukherji* v. *East India Railway Co. 23 C. W. N. 145 S. C. 28 C. L. J. 483; Blong* v. *Emp.* 1924 *Pat.* 767).

It has however been held that a Magistrate has jurisdiction to pass an emergency order without setting out therein the grounds of his action where on the facts reported by the police and accepted by the Magistrate there appears to be no doubt that a most serious riot is apprehended. (*Bhupendro Mohan Pal* v. *Chairman Madaripur Municipality 18 Cr. L. J. 892*).

Where the matter is likely to be decided by the civil court shortly and there is no apprehension of an immediate breach of the peace there is no necessity of action under the section. (*Subramania Iyar* v. *Muthu Ambalan* 15 *Cr. L. J.* 291).

(4) There is sufficient ground for proceeding under the section.

Under the section as it now stands it is a condition precedent to the application of the section that besides considering that immediate prevention or speedy remedy is desirable the Magistrate should be of opinion that there is sufficient ground for proceeding under the section.

The words are plain enough and whatever might have been the intention of the Legislature courts are only concerned with the effect of the amendment by the addition of the words "there is sufficient ground for proceeding under this section".

A similar provision has been made in Secs. 107 and 108. It is noteworthy that all the three sections, 107, 108 and 144 in which the legislature has now said in so many words that Magistrates are to take action only when there is sufficient ground for proceeding, are provisions under which Magistrates "may take action" and not "shall take action" as under Sec. 145 in cases of disputed possession of immoveable property. The words "may take action" always leave it to the discretion of the Magistrate whether or not to take action at all and the addition of the words in question simply emphasises the necessity of the exercise of discretion by the Magistrate. There may be a case in which an order under the section is likely to prevent obstruction and annoyance, etc., contemplated in the section and immediate prevention or speedy remedy may also be desirable but still there may be circumstances present under which it would be better for the Magistrate not to move at all. In such a case the Magistrate has ample discretion whether or not to proceed and he shall proceed only if all things taken together he considers that there is sufficient ground for proceeding under the section.

It being a condition precedent to the initiation of proceedings that the Magistrate should be of opinion that there is sufficient ground for proceeding with the section the order should show that such ground exists.

(5) Material facts must be stated in the order.

See *Karoolal Sajwal 9 C. W. N. 864.*

Besides material facts leading up to the order it should show (1) that there is sufficient ground for proceeding under the section (2) that immediate prevention or speedy remedy is desirable and (3) that the order is likely to prevent or tends to prevent obstruction, annoyance, etc.

In *Venkata Raman* v. *Emp.* 1917 *M. W. N.* 721 the omission to state in the order that it is likely to prevent obstruction, annoyance, etc., has been held by Sadasiva Ayer J. to be a mere irregularity.

The material facts in the case of an *ex parte* order include the circumstances showing why the Magistrate was temporarily unable to prevent a breach of the peace by intending peace-breakers. (*Venkata Ranman Ayer* v. *Emp.* 1917 *M. W. N.* 721).

(6) Dispute relating to rival "Hats."

The most appropriate section of the Code to deal with cases of rival Hats which may cause a breach of the peace is Sec. 107. (*Satis Chandra Roy* v. *Emp.* 11 *C. W. N.* 79; *Bidhuranjan Majumdar* v. *Romesh Chandra Roy* 11 *C. W. N.* 223). (N. B. The Full Bench decision of *Ramnath Chowdhury* v. *Emp.* 11 *C. W. N.* 942 *overruled Bidhuranjan* v. *Romesh Chandra* on the question of the legality of an order under Sec. 144 when no time limit is mentioned in the order. It did not in any way disapprove of the observations of Mitra and Holmwood J. J. as to the desirability of proceeding under Sec. 107 instead of Sec. 144 in cases of dispute relating to rival Hats).

(*a*) Magistrate cannot prohibit one of two rival proprietors of two different Hats from holding for the future his Hat on particular days.

As far back as 1879 in *Gopi Mohan Moulik* v. *Taramani Chowdhrani* 4 *C. L. R.* 309 (*F. B.*) the question was considered by a Full Bench consisting of the entire body of judges of the court.

The reference to the Full Bench was in a Regular Appeal from the decision of the subordinate judge of Mymensing.

The plaintiff alleged that he was the owner of a Shikmi Taluk consisting of Mouzahs Nalitabari, etc., that within Mouzah Nalitabari there was a Hat which used to be held on Tuesdays and Fridays, that a new Hat called Tarajung was established by the defendant in a neighbouring place within the

Zemindari of the latter who attempted by illegal means to prevent people from making their market in his Hat, that disputes having arisen in consequence of defendant's illegal acts the Deputy Magistrate by an illegal and unjust order prohibited the plaintiff under Sec. 518 of act X of 1892 (corresponding to the present section 144) from holding the Nalitabari Hat on the days it used to be assembled. The plaintiff brought the suit to have the order of the Magistrate set aside and to have it declared that he was entitled to hold his Hat on Tuesdays and Fridays.

The order of the Magistrate was in the following terms—"You are hereby prohibited from holding the Nalitabari Hat on Tuesdays and Fridays in accordance with the provisions of Sec. 518 Cr. P. C. and you are ordered to alter the days of holding the said Hat".

Garth C. J. in delivering the judgment of the court observed—"As we are aware that Magistrates in this country have been in the habit of making orders of this nature restraining persons for an indefinite period from the exercise of civil rights over their property and as this practice has apparently derived some sanction from former Full Bench decisions of this court, it has been thought advisable in this instance to take the opinion of the whole of the judges in order to determine a question which undoubtedly is of very great importance to the public.

We consider that the Magistrate had no jurisdiction to make so wide an order and that the grant of what is in effect a perpetual injunction is entirely beyond his powers.

He might have prohibited the holding of the Hat on any particular occasion or occassions but he had no right to deprive the plaintiff for ever of a right to which he was by law entitled.

Assuming the facts to be true the plaintiff was entitled to a decree declaring that as against the defendant he has a right to hold his Hat on Tuesdays and Fridays".

Gopi Mohan Moulik's case was decided under the Code of 1872 in Sec. 518 of which corresponding to Sec. 144 there was no provision for the order being in force for two months

only and the reason of the decision was that an order like the one that was made in the case was in the nature of a perpetual injunction and was as such *ultra vires.*

Since the passing of the Code of 1882 the durability of an order under Sec. 144 has been limited to two months only and the question is how far Gopi Mohan Moulik's case is still a binding authority. Can the Magistrate now for two months prohibit the holding of a rival Hat on particular days of the week?

There is nothing to prevent the Magistrate from doing it.

(*b*) Holding of rival Hat on same days with old Hat can be prohibited.

A Magistrate is empowered to pass an order under Sec. 144 prohibiting the holding of a rival Hat on the same days with the old Hat. (*Nagendro Nath Biswas* v. *Rakhal Das Sinha* 23 *C. W. N.* 141 *Parmeshwar Rai* v. *King Emp.* 1922 *Pat.* 204).

(*c*) Hat cannot be ordered to be held on certain days only in the week.

The Magistrate is only competent to make an order for abstaining from a certain act. He cannot enjoin the doing of an act.

Accordingly it has been held that Sec. 144 does not empower a Magistrate to direct that a Hat be held on certain days only of the week. If his object is thereby to prevent the Hat from being held on certain other days of the week he has power under the section to make an order prohibiting the party from holding the Hat on these days. (*Shamanondo Das Paharaj* v. *Emp.* 8 *C. W. N.* 781).

(*d*) Hat cannot be ordered to be removed to such a distance as to render it useless.

Following closely upon the decision of the Full Bench in Gopi Mohan Moulik's case 4 C. L. R. 309 Morris and White J.J. had to consider the legality of an order made under Sec. 518 of Act X of 1872 directing the owners of a new Hat to desist from

holding their Hat on its new site and to remove it within one week to a distance of nearly half a mile. It appeared that the effect of removal to such a distance was to entirely destroy the new Hat.

It was held that the order was in excess of jurisdiction within the meaning of the rule laid down in Gopi Mohan Moulik's case. (*Sharat Chandra Banerji* v. *Bamacharan Mookerji* 4 *C. L. R.* 410).

(*e*) Holding of Hat on one's own land cannot be prohibited.

The holding of a Hat on a man's own property is not in itself a wrongful act and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace unless these ulterior consequences are made the basis of the proceedings.

An injunction cannot be issued to a person restraining him from doing a lawful act upon his own property. Therefore an order directing a man not to use his property in a lawful manner for instance not to establish a Hat on his own land does not come within the purview of Sec. 144 of the Code.

What the Magistrate ought to do is to order parties not to obstruct or allow their servants to obstruct any person from attending the other market if he wished to do so. (*Rakhal Das Sing* v. *Emp.* 19 *C. W. N.* 248).

In *Banwar Lal Ram* v. *Pronab Krishna* 26 *C. W. N.* 663 *S. C.* 35 *C. L. J.* 397 the petitioners started a new Hat on their own property within a certain locality where existed an old Hat belonging to the opposite party but on a day different from that on which the old Hat was held. The Magistrate acting on a police report made an order prohibiting "any person from going to buy or sell in the said place." The petitioners shifted their Hat to another place and the Magistrate again made a similar order.

It was held that every person is ordinarily entitled to exercise all rights of ownership on his own property and the holding of a Hat on one's property is not in itself a wrongful act. The Criminal court assumes jurisdiction to interfere with

the lawful exercise of a person's right to ownership when such exercise in its ulterior consequence and being directed primarily against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace.

That inasmuch as the petitioners claimed exclusive possession of the land on which they wanted to hold the Hat and intended to hold it on a day other than the day on which the Hat of the opposite party assembled the Magistrate had no jurisdiction to make an order in the form in which it was made prohibiting the petitioners from holding their Hat on any day of the week and on any place within a large area.

(*f*) Public generally cannot be directed to abstain from attending Hat.

An order can only be issued to the public generally when frequenting or visiting a particular place. An order which directs the public in general to abstain from attending a Hat is bad since it is not until the public attends the Hat that the order can be binding on them. (*Ashutosh Roy* v. *Haris Chandra Chattopadhay* 29 *C. W. N.* 411).

In this case an old Hat called the Hingulgunge Hat used to be held on Sundays and Thursdays. A new Hat called the Basantapur Hat was opened at an adjoining place on the same days and the Magistrate made the following order—"I do hereby under Sec. 144 Cr. P. C. direct the public in general from the date of the promulgation of this order to abstain from holding or attending the Hat at or near Basantapur on Sundays and Thursdays and not to do any unlawful acts by taking dealers' boats to Basantapur Hat by force or by committing violence to the people so as to dissuade them from attending Hingulgunge Hat and not to commit any breach of the peace and disturb the public tranquillity.

(7) Order prohibiting religious processions and assemblies.

It is on the one hand a right recognised by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed. It is

on the other hand a right recognised by law that persons may for a lawful purpose whether civil or religious use a common pathway by parading it attended by music so that they do not obstruct the use of it by other means. If persons passing in procession attended by music pass a place in which others are assembled and engaged in their worship which the music would tend to disturb it is the duty of the persons composing the procession to refrain from such disturbance ; but assemblies for purposes of worship are held scarcely in any place at all hours and generally at appointed hours and therefore it is unnecessary that there should be a rule that persons should not at any time pass along a high road in the neighbourhood of a recognised place of worship if attended by music. If indeed the procession be of a religious character the prohibition of it may be as real an interference with the full exercise of a religion as in allowing it to proceed past an assembly engaged in worship attended with such circumstances as to disturb that worship and if no religious procession is to be allowed to pass a recognised place of worship whether persons are or are not at the time there assembled and engaged in religious worship the members of a numerous sect might close any high way to the processions of a sect to which they are opposed by erecting in the neighbourhood of each high way a place of worship. The law in the restrictions it imposes on processions of whatever character does not go beyond the necessity. (*Muthialu Chetti* v. *Bapun Saib* 2 *Mad.* 140).

The principles laid down in Muthialu Chetti v. Bapun Saib were examined and approved by a Full Bench of the Madras High Court in *Sundram Chetti* v. *The Queen* 6 *Mad.* 203.

(1) It was laid down that if the Magistrate is satisfied of the existence of an emergency which calls for the exercise of the power conferred on him by Sec. 518 of the Code of Criminal Procedure 1872 he is justified in suspending the exercise of rights however well-ascertained.

(2) That this power is extraordinary and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient.

(3) That where rights are threatened the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. The authority of the Magistrate should be exerted in the defence of rights rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot he can hardly be ignorant of the persons from whom disturbance is to be apprehended and it is his duty to take from them security to keep the peace.

(4) That although the law permits the issue of an order *ex parte* it intends that ordinarily that course should not be pursued so that each party may have a fair hearing.

On the question of curtailing the right, of one community to perform religious ceremonies on the ground of annoyance to another community professing a different faith it was held:—

(1) That in affording special protection to persons assembled for religious worship or religious ceremonies the law points to congregational rather than private worship and it may fairly be required of congregations that they should inform the Magistrate or police at what hours they customarily assemble for worship in order that the rights of other persons may not be unduly curtailed.

(2) That no sect is entitled to deprive others for ever of the right to use the public streets for processions on the plea of the sanctity of their place of worship or on the plea that worship is carried on there day and night.

Turner C. J. who delivered the judgment of the Full Bench observed *as to privileges claimed on the ground of caste or creed* as follows:—

"I may observe that they had their origin in times when a state religion influenced the public and private law of the country and are hardly compatible with the principles which regulate British administration, the equal rights of all citizens and the complete neutrality of the state in matters of religion. The members of one caste have not been allowed to restrict members of other castes from the free use of public thoroughfares.....when anarchy and absolutism yield place to well ordered liberty change there must be, but change in a direction

which should command the assent of the intelligence of the country. With regard to processions, if they are of a religious character and the religious sentiment is to be considered it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere. *But the prejudices of particular sects ought not to influence the law.* A man may have just ground of complaint if he is compelled to recognise the sanctity claimed for a place as the seat of a worship he believes to be false; he has no just ground of complaint if he is compelled to recognise the civil right of his fellow citizens to be protected from disturbances when they are assembled for public worship, unless indeed all recognition of public worship is repugnant to him. Again assuming that the courts were satisfied that a privilege had been duly acquired and that it was competent to them to recognise it, it must be remembered that it is based on custom and that *custom is sound only when and so far as it is reasonable.* It would have then to be considered whether it was reasonable to require persons exercising a natural right to abstain from its exercise when passing a place where no public worship was proceeding.

The first duty of Governmnet is the preservation of life and property and to secure this power is conferred on its officers to interfere with even the ordinary rights of members of the community. Where the Government cannot protect both classes of rights, *viz.*, rights which have a primary and rights which have a secondary claim to the protection of Government it may, and it ought to, abandon the latter to secure the former. In this view it matters not whether the exercise of the right of procession is of ancient usage or a novelty The Government is not bound to deprive some members of the community of the services of the force that is found necessary for the protection of their lives and property to enable others to exercise a right which not only is not indispensable to life or to the security of property but creates an excitement which endangers both.

It cannot be reasonably required that the Government should increase the force maintained for the protection of the peace to such an extent that its cost will cast an undue burden on the resources of the country."

Where a Magistrate apprehends grave danger of breach of the peace and he cannot prevent it with the force at his command he has jurisdiction to pass a temporary order under Sec. 144.

The fact that a procession is in the nature of a luxury and not a necessity is no ground for passing a temporary order. (*Areemuga Mudali* v. *Perumal Swami Chetty* 15 *Cr. L. J.* 30).

(8) Abstain from a certain act.

The section authorises a Magistrate to direct a person to abstain from a certain act and not to direct him to do a certain act.

So an order directing the police to see that a person may be allowed to go to a land and cut the crop is *ultra vires*. (*Moniuddin* v. *Emp.* 22 *Cr. L. J.* 442).

An order directing certain prostitutes and their Zemindars under whom they held the land to remove the houses of the former from a particular site within 24 hours and to take up their quarters on the opposite side of a railway line on the ground that the visitors to the prostitutes had to cross the railway lines and thereby their lives would be endangered was held to be beyond the scope of the section. (*In the matter of the petition of Bireshwar* 2 *C. W. N.* 70).

(9) Take certain order with certain property.

Where one party applied to a Magistrate for an order directing the other party to take some idols which were in their possession and custody to the residence of the applicant for worship during a certain festival in accordance with an alleged custom and usage of longstanding it was held that a Criminal Court has no power to decide the question of any such right as was claimed by the applicant much less to assume

it and proceed to make an order under Sec. 144. (*Kamal Narain Adhikary* v. *Raja Jotindra Mohan Roy* 8 *C. W. N.* 376).

(10) Order interfering with the management of temples and mosques.

Where the Magistrate ordered that two rival sects of Mahomadans could each enter a mosque only at stated times it was held that though the order was not in terms one to abstain from a certain act it was in substance such an order and was hence legal. (*Q. Empress* v. *Abdulla Saheb* 24 *Mad.* 262).

Where an order under Sec. 144 directed a person not to interfere with the management of a certain temple till another was evicted from management by due course of law it was held that the first portion of the order was a direction to abstain from a certain act within the meaning of Sec. 144 but that the latter portion contravened Sec. 144 and was without jurisdiction. (*Ramaddan Chetty* v. *Muragapa Chetti* 24 *Mad.* 45).

Where the Magistrate passed the following order "I direct the following persons Shevadhars Pujaris and the public generally to abstain from interfering with the Badves in the performance of the daily puja of the God Vethoba at Pandurpur and I direct that the Badves alone perform the same pujas" it was held that the Magistrate had jurisdiction to pass the order. (In *re Vasudo* 4 *Bomb. L. R.* 582).

A certain Matwali of a mosque appointed as Pesh Imam a certain person with whom the congregation got dissatisfied. The people therefore refused to read their prayers with him. Ultimately proceedings under Sec. 144 were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque on account of an apprehension of breach of the peace.

It was held that the order was a misconceived one ; unless the Matwali was displaced in due course of law no one had a right to interfere with the management of the trust property.

If the effect of the order of the Magistrate was that no Mahomedan would be allowed to say his prayer in the mosque the order was not justified under Sec. 144. The proper course was to bind over the party that was in the wrong. (*Haji Uzhomad Ismail* v. *Munshi Barket Ali* 26 *C. W. N.* 904).

The Magistrate has no power to direct a party to make a channel in his own land under Sec. 144. (*Subramanya Ayar* v. *Muthu Ambalam* 15 *Cr. L. J.* 291).

(11) Jurisdiction to take property in dispute in custody.

Where disputes and differences having arisen between the head members of a church and its secretary the Magistrate drew up a proceeding under Sec. 144 and passed an order forbidding anything that might tend to disturb public tranquillity and at the same time directed with the consent of both parties that certain articles concerning which the parties were in dispute be removed into the custody of the court and should remain there for two months or until the decision of a civil suit regarding the same which was then pending before the High Court, it was held that the court's custody of the articles was wholly without jurisdiction and the High Court had power to order that matters should be restored to exactly the same condition as the Magistrate found them in before he passed the order removing them into court's custody. (*Leong Mow* v. *Tchun* 12 *C. W. N.* 1044).

Once a Magistrate passes a final order under Sec. 144 he is *functus officio* and cannot make any order with respect to the sale of property kept in custody. Such an order is not an executive order but is open to revision by the High Court. (*Mussanmat Mainabati* v. *Dulla Manjri* 21 *Cr. L. J.* 657).

(12) Order in the nature of perpetual injunction.

A Magistrate is not competent to make an order under Sec. 144 which not being limited in time purports on the face of it to be in the nature of a perpetual injunction. (*Gopi Mohan Moulik* v. *Taramoni Chowdhurani* 4 *C. L. R.* 309 ; *Runjit Sing* v. *Luchman Prasad* 7 *C. W. N.* 140).

But after the decision of the Full Bench in *Ram Nath Chowdhury* v. *Emp.* 34 *Cal.* 897 *S. C.* 11 *C. W. N.* 942 *S. C.* 6 *C. L. J.* 186 orders indefinite as to time during which they are to remain in force cannot be held according to the view of the Calcutta High Court to be bad in law and liable to be set aside but must be taken to be valid orders for two months only. According to the Full Bench unless there is something to the contrary in the order in question it must be presumed that the order was to be limited to the period of two months specified in the Code.

The issue of an order in the nature of a permanent injunction under the shelter of Sec. 144 which relates to the passing of provisional orders to tide over temporary emergencies and in cases where immediate prevention and speedy remedy is desirable has been condemned. (*Mayyaru Ammal* v. *Emperor* 28 *M. L. J.* 132 ; *Govind Chetti* v. *Perumal Chetty* 38 *Mad.* 489 *S. C.* 25 *M. L. J.* 370).

Where the facts of a case call for a permanent injunction an order under the section should not be made. (*Cowashji Jehanger In re* 22 *Bomb. L. R.* 157 *Per Shah J. Hayward J. contra*).

(13) Irrevocable order.

An order of an irrevocable nature instead of having force for two months only is *ultra vires*. (*Umatul Fatima* v. *Nemai Charan Bannerji* 32 *Cal.* 154).

These orders are wholly beyond the scope of the section which contemplates only the making of temporary orders lasting for two months and liable to be rescinded any moment during that period.

(14) Indefinite order.

An order to the effect that the petitioner should not go to a certain village or allow any of his servants, relations or friends to go there is of the most indefinite character. (*Golam Mohomad* v. *Bhuban Mohan Moitra* 2 *C. W. N.* 422).

An order directing a person "not to commit any act that may likely induce a breach of the peace and not to take forcible possession" is indefinite and not according to law. (*Bibi Kulsum* v. *Umatul Mehdi* 11 *C. W. N.* 121).

Orders indefinite as to time during which they are to remain in force will not be set aside merely on that ground but will be taken to be valid for two months only. (*Ramnath Chowdhury* v. *Emp.* 34 *Cal.* 897 *S. C.* 11 *C. W. N.* 924 *S. C.* 6 *C. L. J.* 186 *F. B.*).

(15) Successive orders.

A Magistrate cannot by making successive orders under the section extend the operation of an order indirectly beyond two months. (*Bisheswer Chakravarti* v. *Emp.* 20 *C. W. N.* 758; *Satish Chandra Roy* v. *Emp.* 11 *C. W. N.* 79; *Runjit Sing* v. *Luchman Prasad* 7 *C. W. N.* 140; *Govinda Chetty* v. *Pirumal Chetti* 38 *Mad.* 489. *Swaminatha Mudaliar* v. *Gopala Krishna Naidu* 39 *Mad.* 543; *Rashbehari Sing* v. *Jug Narain Roy* 3 *Pat. L. J.* 130; *Murari Naiku* v. *Aiyaswami Naiken* (1922) *Mad. W. N.* 612).

To draw up the same order once more merely adding to the parties affected is an attempt to evade the provisions of clause (6) of Sec. 144 and is illegal if the total period exceeds two months. (*Ashutosh Roy* v. *Haris Chandra Chattopadhyay* 29 *C. W. N.* 411).

Order to remain in force for two months only.

Under sub-sec. 6 no order under the section shall remain in force for more than two months from the making thereof.

The Local Government may in certain cases, *viz.*, of danger to human life, health or safety or a likelihood of a riot or affray extend the period by notification in the official gazette.

This extension may in the discretion of the Local Government be for any length of time.

The order issuing the notice is an order under Sec. 144 and as such can remain in force for two months from its date and the confirmation of the said order on a subsequent day on

cause being shown could not extend the period of its operation beyond these two months. (*Thomson v. Emp.* 13 *C. W. N.* 195).

Notice to party before making order.

Although the law permits the issue of an order *ex parte* it intends that ordinarily this course should not be pursued so that each party may have a fair hearing. (*Sundram* v. *Chetty* 6 *Mad.* 203 *F. B. Muhammadi Mollah* v. *Empress* 2 *C. W. N.* 747).

(16) Service of order.

The service is to be effected in manner provided by Sec. 134.

Sec. 134 (1) The order shall if practicable be served on the person against whom it is made in manner herein provided for service of a summons.

(2) If such order cannot be so served it shall be notified by proclamation published in such manner as the Local Government may by rule direct and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

The survice of summons is to be effected in the manner laid down in Secs. 69, 70, and 71.

Where the serving officer's return showed that personal service could not be effected and therefore service was effected by affixing a copy to some conspicuous part of the house but it did not show that service by leaving a copy with an adult male member of the family was impossible it was held that there was no proper service of the conditional order. (*Beni Madhab Sapui* v. *Jadunath Sapui* 31 *C. W. N.* 148).

(17) Rescinding of order.

Under Sub-sec. 4 an order may be rescinded by the Magistrate who made the order or by his successor in office or by a superior Magistrate.

Sub-Sec. 4 has been amended in 1923 so as to make it clear that the order may be cancelled by the Magistrate competent to rescind it either on his own motion or on the application of any person aggrieved.

The words "any person aggrieved" indicate the individual to whom an order is directed or in the case of prohibitory orders against the public any member of the section of the public affected by the order.

The words used are "any person aggrieved" and it must mean any person aggrieved by the order.

Sub-Sec. (5) ensures a hearing in the case of an application for rescinding an order and enjoins the Magistrate to record his reasons in writing if he rejects the application wholly or in part. *A record of the reasons is not necessary if the application is granted and the order in question is cancelled.*

Sub-Sec. 5 lays down that an early opportunity is to be given to the applicant to show cause against the order either himself or by pleader.

There are very cogent reasons for making this provision which are to be found in cases like *Banwar Lal Ram* v. *Pronab Krishna* 26 *C. W. N.* 663 *S. C.* 35 *C. L. J.* 397 where it had to be laid down that it is not proper for a Magistrate to pass an *ex parte* order under Sec. 144 and when its propriety or legality is challenged to postpone the hearing of the matter from time to time until about the termination of the force of the order. Their Lordships observed that such matters ought to be disposed of quickly in order to avoid unnecessary encroaching on the civil rights and liberty of the subject.

The power to rescind an order already made is given to Magistrates only. The Local Government can only extend the period during which the order is to be in force in certain specified cases but it cannot cancel an order made by a Magistrate. But the Local Government has always the power to withdraw from a prosecution started for disobedience of an order made by a Magistrate. Quite recently during the period following the communal riots in Calcutta in April, 1926, two prominent public leaders were served with orders under Sec. 144 directing them not to enter Calcutta and not to deliver any public

speeches. The orders were disobeyed and the persons in question came to Calcutta and addressed meetings. Proceedings under Sec. 188 I. P. C. were taken for disobedience of the orders under Sec. 144 Cr. P. C. but subsequently the prosecution was withdrawn under orders of the Local Government. The reasons for the withdrawal were that in consequence of the speeches delivered which were not in any way offensive no breach of the peace had taken place and as the apprehension of a breach of the peace was the only ground for making the prohibitory order it was not necessary to proceed with the trial.

The power conferred by Cl. (4) is limited only to the cancellation of the order. In exercise of this power the District Magistrate cannot substitute an order of his own for that already made. (*Ganpat Sing* v. *Emp.* 3 *Pat. L. J.* 287).

The word "alter" does not mean substitution of the names of one party for those of the other and the District Magistrate cannot make an order against the opposite party in whose favour an order had been made by the Sub-divisional Magistrate. (*Muthu Kumaraswami* v. *Muhammad Rewthar* 42 *M. L. J.* 352).

The District Magistrate must dispose of an application made under Cl. 4 and he cannot make over the application to the Magistrate who made the order for disposal. (*Sudarsanam Aiyangar* v. *Elayanathi* 16 *Cr. L. J.* 74).

In Sub-Sec. 4 no grounds are specified on which an order can be rescinded. It follows then that an order can be rescinded on any ground which the Magistrate rescinding the order thinks just. It may be rescinded on the ground (1) that it is no longer necessary (2) that it should not have been made. The latter ground can be urged before a superior Magistrate entertaining an application under sub-Sec. 4.

This is the view taken by a Full Bench of the Patna High Court (*Sheobalak Sing* v. *Ramaruddin Mandal* 2 *Pat.* 94) in which it is pointed out that the words "order made under this section" in sub-Sec. 4 mean "legally made or purporting to be made under this section."

(18) Prohibitory orders against the public.

The public can be ordered to abstain from a certain act only when frequenting or visiting a particular place. It is only in reference to a particular place that a prohibitory order can be made against the public when frequenting or visiting that place.

It has been held that an order which directs the public in general to abstain from attending a Hat is bad since it is not until the public attends the Hat that the order can be binding on them. They cannot be forbidden by the order to do an act when the order cannot be addressed to them until after they have done that act. (*Ashutosh Roy* v. *Harish Chandra Chattopadhyay* 29 *C. W. N.* 411 *see also Emp.* v. *Bhagubhai* 16 *Bomb. L. R.* 684).

The act the doing of which makes the public amenable to the jurisdiction of the Magistrate under Sec. 144 is visiting or frequenting a particular place and after the public have visited or frequented a particular place they can be directed to abstain from a certain act. In the case of the Hat the public cannot be directed to abstain from visiting or frequenting the Hat but after they have visited or frequented the Hat they can be directed to abstain from a certain act.

Consistently with this view an order cannot be made directing the public not to read prayers in a particular mosque.

In *Haji Mahommad Ismail* v. *Munshi Barkat Ali* 26 *C. W. N.* 904 a certain Matwali of a mosque appointed as Pesh Imam a certain person with whom the congregation got dissatisfied. The people therefore refused to read their prayers with them. Ultimately proceedings under Sec. 144 were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque on account of an apprehension of breach of the peace. The order was held not to be justified by Sec. 144 and it was suggested that the proper course was to bind down the party who were in the wrong.

In this view an order cannot be made directing the public not to sacrifice cows in a particular mosque totally or except in a particular manner. The killing of cows is the act which

it is desired that the public should abstain from and the order can be addressed to the public only when they have visited or frequented the particular mosque where the act in question is intended to be prohibited. Such orders are common and have to be made by Magistrates from time to time for preserving the peace but if the interpretation put on sub-Sec. 3 in the case of *Ashotosh Roy* is correct such orders are *ultra vires*, and the proper course would be to make an order directed to the person entrusted with the management of the mosque. He may be directed to abstain from any act which it is necessary to stop and it is for him to see that that act is not done and to achieve this end he is entitled to seek the assistance of the police, if it is beyond his own power to cope with the situation.

As appears from the reports instances have not been many in which this aspect of the matter arising out of the interpretation of sub-Sec. 3 has been considered.

The court of the Judicial Commissioner of Oudh has taken a view which gives the widest possible scope to Magistrates to issue prohibitory orders to the public. It has been held that sub-Sec. 3 is intended to extend rather than to limit the scope of the order so as to include therein even casual or frequent visitors from outside the limits of the particular locality within which the order is to have application and a general order issued by a District Magistrate to the effect that no person should sacrifice or cause to be sacrificed any cow within a certain specified boundary and period is legal. (*Abdul Gafur* v. *Emp.* 18 *Oudh Cases* 70 *S. C.* 16 *Cr. L. J.* 190).

In a case owing to the prevalence of cholera the District Magistrate issued an order under Sec. 144 forbidding the public generally to give caste dinners in a particular city. It was held that the order was illegal inasmuch as the power of the Magistrate under the section is confined to the direction to a particular person to abstain from acts of a certain character or to the public generally to abstain from similar acts when frequenting a particular place. (*Q. E.* v. *Lakhmidas Mukandas* 14 *Bomb.* 165).

(19) Revision of orders made under Sec. 144.

Sub-Sec. 3 of Sec. 435 having been repealed by the amending Act of 1923 an order under the section can be revised by the High Court under Sec. 435 read with Sec. 439 of the Code. In cases of orders made by Magistrates other than District Magistrates the District Magistrate should first be moved for a cancellation of the order and then the High Court.

It is not necessary that the party affected by the order should approach the District Magistrate and ask him to set it aside before coming up to the High Court. (*Akal Mahton* v. *Mahabir Hahto* 24 *Cr. L. J.* 947). But the necessity of a previous application to the District Magistrate was pointed out by the Madras High Court as a condition precedent to the High Court entertaining an application in revision in what is known as the Home Rule Flag case. (*Venkata Raman* v. *Emp.* 1917 *C. W. N.* 721).

The question has often arisen whether an order under the section should be revised after it has become inoperative owing to the efflux of two months from the making thereof. The following are instances in which the Calcutta High Court has revised orders under Sec. 144 after they were dead.

Rooplal Dass 2 C. W. N. 572

(Date of order—1st March, Rule made absolute—29th April.)

Govind Sahai 6 C. W. N. 466

(The order expired the day after the Rule was granted.)

Ranjit Sing 7 C. W. N. 140

(Two orders dated 25th January and 10th February, Rule made absolute—2nd June.)

Isab Mandal 8 C. W. N. 373

(Date of order—19th June, Rule made absolute—21st August.)

Chandra Nath Mukherji 23 C. W. N. 145

(Date of order 13th March—Set aside on 20th June.)

See also 20 C. W. N. 758.

In the Madras High Court in *Muthu Kumar Swami* v. *Muhammad Rowther* 42 *Mad. L. J.* 352 it was held that not-

withstanding the expiry of two months the High Court could examine the order to see whether it was passed with or without jurisdiction. (See also *Kuppu Odayar* v. *Poomalal Goundan* 47 *M. L. J.* 439).

In the Patna High Court in *Dhanraj Bhagat* v. *Bharat Narain Sing* 1924 *Pat.* 703 it was held that notwithstanding that the order in question had lapsed the case was one for interference by the High Court in revision but in *Munni Lal* v. *Batti Ahir* 1925 *Pat.* 514 it was held that an order under Sec. 144 need not be set aside after two months from the making thereof.

(20) Prosecution for disobedience of order. (Sec. 188 I. P. C.)

Sec. 188 deals generally with disobedience of orders duly promulgated by a public servant lawfully empowered to promulgate such order but it deals primarily with cases of disobedience of orders made by Magistrates under Sec. 144 Cr. P. C. The words used in Sec. 188 I. P. C. clearly show this.

Sec. 188 provides for punishment of simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees in one class of cases and in another class of cases the punishment may be imprisonment for either description for a term which may extend to six months or with fine which may extend to one thousand rupees.

(21) Elements necessary to constitute offence.

To constitute an offence under Sec. 188 I. P. C. it is necessary to show first a lawful order promulgated by a public servant, secondly a knowledge of the order and disobedience of it and thirdly the result that is likely to follow from such disobedience. (*Brojo Nath Ghosh* 4 *C. W. N.* 226).

It follows that if any of the three elements is absent the conviction is bad in law.

(A) Lawful Order.

If the order made is not lawful disobedience thereof is not punishable under Sec. 188 I. P. C. (*Proshanyo Coomar*

Chatterji 8 *C. L. R.* 231 ; *Kamal Krishna Banik* 12 *C. L. R.* 231 ; *Shyamanand Paharaz* 31 *Cal.* 990 *S. C.* 8 *C. W. N.* 781 ; *Prem Ch. Sing* 9 *C. W. N.* 392 ; *Bakshi Ram* 3 *All.* 201 ; *Dhan Sing* 1 *A. L. J.* 615 ; *Hari Lal* 14 *Bomb.* 180 ; *Lakhmi Das* 14 *Bomb.* 165).

The legality of the order can be questioned in proceedings under Sec. 188 I. P. C.

Conviction for disobedience of an order the legality of which is under the consideration of an appellate court is bad. (*Dalsookram* 2 *Bomb. H. C. R.* 384).

(B) Promulgated by a public servant.

The word "promulgated" in Sec. 188 I. P. C. refers to orders issued under the Criminal Procedure Code and not to judgments and orders of civil courts. (*Mammali* 39 *Mad.* 543).

The proper remedy for disobedience of an order of injunction passed by a civil court is committal for contempt. (*Chandra Kanto De* 6 *Cal.* 445).

(C) Knowledge of the order and disobedience of it.

The illustration to the section shows that the person prosecuted must have knowingly disobeyed the order. It is not sufficient in order to affect a person with the knowledge of an order under Sec. 144 Cr. P. C. and to render him liable to conviction under Sec. 188 I. P. C. to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. (*Shiekh Abdul* v. *King Emp.* 31 *C. W. N.* 340 ; *See also Ram Tonoo Sing* 12 *W. R. Cr.* 49 ; *Abelakh Lal* 15 *W. R. Cr.* 50 ; *Anant* 1 *Bomb. L. R.* 524).

(D) Likely consequence of disobedience.

A conviction in the absence of evidence as to the likely result of the disobedience of the order is bad in law. (*Brojo Nath Ghosh* 4 *C. W. N.* 226 ; *Nand Kumar Bose* 3 *B. L. R. App.* 149 ; *Shyamanand* 31 *Cal.* 990 *S. C.* 8 *C. W. N.* 781 ; *Ebrahim Sirkar* 29 *Cal.* 236 *S. C.* 6 *C. W. N.* 141).

(22) Suit for declaration of rights and invalidity of orders under Sec. 144.

In *Ujalmayi Dasi* v. *Chandra Kumar Neogi* 4 *B. L. R. F. B.* 24 it was laid down that a suit would not lie in a civil court to set aside an order as to a nuisance duly made under Sec. 308 of Act XXV of 1861 or to restrain the Magistrate from carrying his order into effect.

In *Gopi Mohan Moulik* v. *Taramoni Chowdhurani* 4 *C. L. R. F. B.* 309 a suit was brought to set aside an order of the Magistrate directing the plaintiff not to hold his Hat on Tuesdays and Fridays on which days the defendant's Hat was held and to declare the plaintiff's right to hold the Hat on these days. A decree was made granting the declaration.

In *Babu Sah* v. *Muhammad Hussin Sahib* 42 *M. L. J.* 179 the plaintiffs who were the trustees of a Hindu temple were at the instance of the worshippers at an adjoining mosque restrained under Sec. 144 Cr. P. C. from doing any acts in the assertion of their alleged rights. In an action by the trustees against the worshippers at the mosque it was held that the existence of the order under Sec. 144 Cr. P. C. gave the plaintiffs a cause of action for a declaration of their rights and for an injunction restraining the defendants from interfering with such rights though in the absence of the Chief Presidency Magistrate or the Government there could be no declaration as to the validity of the order assuming that such a relief could be had.

CHAPTER XXXII.

DISPUTE RELATING TO IMMOVEABLE PROPERTY.

Procedure where dispute concerning land etc., is likely to cause breach of peace.

145. (*1*) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(*2*) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(*3*) A Copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

Inquiry as to possession.

(*4*) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear

the parties, *receive all such evidence as may be* produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject:

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date:

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

Party in possession to retain possession until legally evicted.

(6) If the Magistrate decides that one of the parties was *or should under the first proviso to sub-section* (4) *be treated as being in* such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction, *and when he proceeds under the first proviso to sub-sec-*

tion (4) may restore to possession the party forcibly and wrongfully dispossessed.

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing,

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

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(1) Historical note.

Sec. 318 of act XXV of 1861 dealt with disputes relating to possession of immoveable property. The subject matter of the dispute was described as "land, premises, water, fisheries, crops or other produce of land." In Sec. 530 of Act X of 1872 the subject matter was described as "land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land". In Sec. 145 of Act X of 1882 the subject matter was described as "tangible immoveable property or the boundaries thereof".

In Sec. 145 of Act X of 1898 the subject matter was again changed to "land or water or the boundaries thereof", "land or water" being defined to include "buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property".

In 1923 in Cl. (4) the words—"receive the evidence produced by them" have been changed to "receive all such evidence as may be produced by them".

Cl. (6) has been amended so as to authorise the Magistrate to restore to possession a party found to have been forcibly and wrongfully dispossessed within two months of the date of the proceeding.

Clauses 7, 8, 9 and 10 have been added as entirely new provisions.

Clause 7 provides for legal representatives of deceased parties being made parties to the proceeding.

Cl. (8) provides for suitable orders being made by the Magistrate for the custody or sale of the subject of dispute when it is crop or other produce of land subject to speedy and natural decay.

Cl. (9) provides for the summoning of witnesses at the instance of the parties. Clause 10 specifically saves the powers of the Magistrate under Sec. 107 in cases which may come under both Secs. 107 and 145.

An important change made in the Code in 1923 is that it has made an order under Sec. 145 (as also orders under Secs. 143, 144) amenable to the ordinary revisional jurisdiction of the High Court under Secs. 435, 439.

In the Code of 1882 orders under Secs. 143, 144 and proceedings under Sec. 176 were excluded from the operation of Secs. 435, 439 and in 1898 an order under Sec. 145 was also included in the category of the excluded orders. In 1923 all these orders have been made revisable in the ordinary way.

(2) Analysis of the section.

If a Magistrate mentioned in the section is satisfied that a dispute likely to cause a breach of the peace exists concern-

ing any land or water or the boundaries thereof he shall take action under the section.

The expression "land or water" includes buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property.

The subject matter of the dispute must be within the local limits of the Magistrate's jurisdiction.

The first thing the Magistrate is to do is to make an order in writing drawing up a proceeding. Herein he must (1) state the grounds of his being satisfied as to the existence of a dispute likely to cause a breach of the peace (2) call on the parties concerned in the dispute to attend his court in person or by pleader within a time fixed and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The date fixed in the initial order is for filing written statements only.

The order is to be served as a summons under Sec. 69 and the following sections. It is to be served personally on the party and if that is not possible it is to be served by leaving one of the duplicates for him with some adult male member of his family and if both these methods of service are not available then a copy of the order is to be affixed to some conspicuous part of the house or homestead in which the person to be served ordinarily resides.

Moreover one copy is to be affixed to some conspicuous place at or near the subject of dispute.

The Magistrate is to approach the matter solely with a view to ascertain who is in actual possession of the subject of dispute. He shall make no reference to the merits of the claims of any of the parties to a right to possess.

The Magistrate is (1) to peruse the written statements put in by the parties (2) hear the parties (3) receive all such evidence as may be produced by the parties (4) consider the effect of such evidence (5) take such further evidence (if any) as he thinks necessary.

After doing all this the Magistrate is to decide (if it is possible for him to decide) whether any and which of the parties

was at the date of the proceeding in actual possession of the subject of dispute.

After perusing the written statements and hearing the parties the Magistrate is to fix a date for producing evidence.

If he finds it impossible to come to a decision as to actual possession he is to attach the subject of dispute under Sec. 146.

If it appears to the Magistrate that any party has within two months next before the date of the proceeding been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at that date.

If the Magistrate considers the case one of emergency he may at any time attach the subject of dispute pending his decision under the section.

At any time during the enquiry any party to the proceeding or any other person interested may appear before the Magistrate and show that no dispute likely to cause a breach of the peace exists or has existed If this is shown to the satisfaction of the Magistrate he shall cancel the proceeding.

If the Magistrate comes to a decision as to actual possession he is to make an order declaring the party found to be in possession to be entitled to possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction.

Where the Magistrate makes a declaration as to the possession of a party who has been forcibly and wrongfully dispossessed within two months of the date of the proceeding he may restore to possession the party forcibly and wrongfully dispossessed.

On the death of a party to a proceeding his legal representative may be made a party to the proceeding in his place.

If there is any dispute as to who the legal representative is all persons claiming to be legal representatives are to be made parties.

Pending the enquiry the Magistrate can make an order for the proper custody or sale of the subject of dispute when it is crop or other produce subject to speedy and natural decay.

On the completion of the enquiry the Magistrate is to make such order for the disposal of such property or the sale proceeds thereof as he thinks fit.

On the application of either party the Magistrate may at any stage of the enquiry summon any witness. He may also summon a witness under Sec. 540 of his own accord.

The section does not in any way derogate the powers of the Magistrate to proceed under Sec. 107.

(3) General remarks.

Sec. 145 has no application in a Presidency town.

When the conditions laid down in the section are fulfilled it is the imperative duty of the Magistrate to take action. This section gives the Magistrates mentioned therein power to settle disputes relating to immoveable property. The only other section in the Code of Criminal Procedure which gives the Magistrate jurisdiction to deal with immoveable property is Sec. 522 under which whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property the court may if it thinks fit when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same.

As observed by Sir Henry Prinsep in his Commentary "Magistrates should be most careful before they take proceedings under Sec. 145.

They should always bear in mind that the primary object of an unscrupulous person in fomenting a dispute so as *prima facie* to form sufficient ground for proceedings under Sec. 145 is with an insecure title to obtain a summary order in his favour and thus to put an adversary to a disadvantage in litigation which he desires to promote and in which he will be in a better position as a defendant with the burden of proof on the other side to prove his title."

"It should be impressed upon Magistrates that the whole object of and only excuse for proceedings under Sec. 145 is

the prevention of a breach of the peace supposed to be imminent and that the procedure to be followed in disposing of such cases is that laid down in Sec. 145 (4) of the Code which must be strictly observed. It should be the primary aim of the inquiring officer therefore to arrive at his decision with the utmost promptitude consistent with an adequate investigation into the dispute before him and he should be specially careful not to permit the proceedings to assume the complexion of a civil suit or in any way to countenance an endeavour on the part of either party to secure any advantage for the purposes of civil litigation." (Circular order of the High Court, Criminal).

The action to be taken (though judicial enquiry and judicial discretion are no doubt required as essential to the exercise of the powers conferred) is quasi executive action having for its object and justification the prevention of a breach of the public peace. (*In re Pandurang Govind Pujari* 25 *Bomb.* 179; *Motilal Hargobinda In re.* 6 *Bomb. L. R.* 247).

(4) Magistrates who can take action under the section.

A District Magistrate, a Sub-divisional Magistrate and a Magistrate of the first class can proceed under the section. A Sub-divisional Magistrate may be a Magistrate of the second class. The jurisdiction to make a final order under section 145 (or under section 147) is not personal to the Magistrate who initiates the proceeding and a District Magistrate may of his own motion transfer a case under Chapter XII of the Code to a Magistrate of the first class subordinate to him. (*Ram Kishan Roy* v. *Dwarkanath Sen,* 10 *C. W. N.* 1095).

A Magistrate of the first class holding court at head-quarters has local jurisdiction throughout the district. (*Ram Kishan Roy* v. *Dwarka Nath Sen*).

(5) Imperative duty of Magistrate to take action.

Where the conditions mentioned are fulfilled it is the duty of the Magistrate to take action. The words are "he *shall* make an order" whereas under sections 107, 108, 109, 110, 133, 143, 144, 147, the Magistrate may make an order.

(6) Subject matter of dispute. Sub-section (1).

In Act XXV of 1861 the subject matter of dispute was described in section 318 as "land, premises, water, fisheries, crops, or other produce of land."

In section 530 of Act X of 1872 it was "land or the boundaries of any land or concerning any houses, water, fisheries, crops or other produce of land."

In section 145 of Act X of 1882 this was replaced by "tangible immoveable property or the boundaries thereof "

In Act V of 1898 it has been altered to "land or water or the boundaries thereof" and "land or water" has been defined in Cl. 2 of section 145 to include "buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property "

The legislature has practically gone back to the definition in the first Code with the addition of buildings, markets, and the rents or profits of the property in dispute expressly mentioned The experience of nearly 40 years showed that the definition in the first Code was the nearest approach to perfection.

This alteration in the Code of 1898 was due to the rulings under the Code of 1882 in which it was held that a dispute as to the right to collect rent was a dispute concerning tangible immoveable property but one concerning the right to fish in a *jalkar* or the right to a ferry was not. *Jalkars* ferries all now come within the purview of the section by virtue of sub-section (2).

A dispute not relating to possession of a share in fishery but to a share in its profits may be dealt with under section 145 by virtue of sub-section 2 (*Bhola Nath Chakravarti* v. *Peary Sarma* 11 *C. L. J.* 412). The right to a ferry, *i.e.*, the right to carry passengers to and fro cannot be treated apart from the possession of the lands used on either side of the stream for the purpose of landing them. It is a proper case to be dealt with under section 145 where the subject matter of dispute is a ferry including the land and water upon which the right of ferry is exercised. (*Hurbullabh Narayan Sing* 26 *Cal.* 188).

(7) Cases coming within the section.

(a) Dispute relating to collection of rent.

Constructive possession through the collection of rents is actual possession which may be determined in proceedings under section 145 (*Laldhari Sing* v. *Sukdeo Narayan Sing* 4 *C. W. N.* 613 *Per Prinsep J. Burkis Bibi* 17 *M. L. T.* 225). In such enquiry the question must always be who was actually collecting rents at the date of the preliminary order. (*Burkis Bibi Ibid*). The earlier cases of *Promotho Bhushun Deb Roy* v. *Durga Charan Bhattacharya* 11 *Cal.* 413: *Surbanondo Basu Majumdar* v. *Pran Sankar Roy Chowdhury* 15 *Cal.* 527, *Abhayeshwari Debi* v. *Shidheswari Debi* 16 *Cal.* 513 decided under the Code of 1882 held that a dispute as to the right to collect rent was a dispute concerning tangible immoveable property within the meaning of section 145. A dispute regarding the collection of produce rent between the *lakherajdar* and *patnidar* comes within the section (*Haridas Samanto* 19 *C. W. N.* 959).

(b) Dispute relating to management.

The section applies to cases of dispute as to the right of management of immovable property when the conditions laid down in the section are fulfilled. (*Ghashiram* 1917 *Pat.* 350). It is not possible to lay down any general rule on the question whether a Magistrate has jurisdiction to interfere under section 145 in a case of dispute about management. The point to be considered in each case will be first whether the dispute is concerning land or water or the boundaries thereof within the meaning of the section and secondly whether the acts found to have been exercised are such as to justify a finding of possession. *The mere fact that the word management is used to describe the acts of possession which each party claims to have exercised would not exclude the jurisdiction of the Magistrate* (*Ghasiram Amrit* v. *Mull* 1917 *Pat.* 350, 18 *Cr. L. J.* 858). See also in this connection *Radharaman Ghosh vs. Baliram Ram* 32 *Cal.* 249 which relates to a dispute arising out of the management of a partnership business.

(c) Dispute between rival lessees.

A Magistrate can take action under section 145 when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace. (*Gopala Aiyar vs. Krishna Swamy Iyer* 27 *M. L. T.* 234).

(d) Dispute relating to mining rights.

Minerals underneath the ground are tangible immoveable property. (*Jagannath Marwari* v. *Ondal Co.* 12 *C. W. N.* 840). Mining rights come within the section as profits derivable from land (*Bimala Prassad Mukherji* 24 *Cr. L. J.* 108 ; *Andrew Yule* v., *Skone* 4 *Pat. L. J.* 1154) and even prospecting or boring licenses which can only be utilised by going upon the land and exercising some rights relating to it. (*Bimala Prasad Mukherji* 24 *Cr. L. J.* 108). The contrary view had been taken by Chowdhuri J. in *Indian Iron and Steel Co.* 32 *C. L. J.* 54 and the section held to be inapplicable where the dispute related to the right of boring holes for prospecting purposes over a large Mouza.

(e) Dispute relating to alluvial lands.

It is open to the Magistrate in the case of alluvial lands recently formed when questions of breach of the peace arise to deal with the matter either under Act V of 1920 or under the provisions of section 145 Cr. P. C. There is no implied repeal of section 145 Cr. P. C. so far as alluvial lands recently formed are concerned by Bengal Act V of 1920 (*Abdul Jubbur Munshi* 28 *C. W. N.* 783).

(f) Crops and other produce of land.

Crops and other produce of land can form the subject matter of dispute within the meaning of the section *so long as they are attached to the land.* (*Shah Ramjan Ali* 6 *C. W. N* 881).

Mahwa crops which have fallen from the trees and been actually collected and removed are outside the scope of the

section. (*Chaurisi* v. *Rama Shankar* 28 *All.* 266 *S. C.* 3 *A. L. J.* 13).

When the produce though cut is still lying on the land it is covered by the section. Once it has been removed and is wholly unconnected with, disunited from the land in dispute the Magistrate ceases to have jurisdiction. (*Sunder Mull vs. Jhari Lal* 2 *Pat. L J.* 637).

Crops harvested and rents received since the beginning of the dispute may be attached. (*Srinivash Pillai* 13 *Cr. L. J.* 295).

Where the Magistrate drew up proceedings concerning a mine with regard to which there was a likelihood of a breach of the peace between the parties and included in the proceedings certain mica taken from the mines and stored in a godown belonging to a person wholly unconnected with the parties and their dispute in a village which was in no way connected or associated with the land in dispute it was held that the proceedings in respect of the mica were without jurisdiction. (*Sunder Mull* v. *Jhari Lal* 2 *Pat. L. J.* 637).

Where the parties claimed possession over certain shares as lessees of a village and a dispute originated in respect of crops stored on the thrashing floor it was held that the real dispute was with regard to the possession over the alleged shares leased out to the parties though it originated in the stored crops and section 145 Cl. (2) gives jurisdiction in respect of disputes regarding the right to make collections or to appropriate the crops or produce of a village or shares in a village. (*Pandit Mahton* v. *Sirajul Huq* 2 *Pat. L. W.* 67).

Lac if crop.

Crop in section 145 is restricted to something the produce of the soil. Lac for example is not a crop within the meaning of the section. Trees may come within the definition of land as being produce of land but lac which is not a part of the tree itself but is a parasitic growth on the tree is not a produce of land. (*Ali Muhammad Mandal* v. *Piggot* 32 *C. L. J.* 255 *S. C.* 24 *C. W. N.* 1039).

Other cases.

The right to tap a tree has been held to be a question which may be the subject of a proceeding under section 145. (*Jiblal Mahton* v. *Emp.* 3 *Pat. L. J.* 316)

(8) Cases outside the scope of the section.

(a) Possession of servant or agent.

Possession that can be pleaded in a proceeding under section 145 must be possession based on a claim of right to possession. The possession of an agent or a servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master. (*Nritya Gopal Sing* v. *Chandi Charan Sing* 10 *C. W. N.* 1088).

(b) Periodical possession.

Section 145 only deals with rights of continuous possession of immoveable property and will not cover a case where one party claims exclusive right to a site and the other party claims a right to carry on public worship without disturbance only on a certain day in the year. (*Manik Chandra* v. *Preonath* 17 *C. W. N.* 205).

The section does not apply to the right to weigh grain in a market and realise the weighment dues (*Makbul Ahmed* 20 *A. L. J.* 694) or where the dispute is between the proprietor and the stall-holder in a market as to the possession by the stall-holder of a stall once every week. (*Nayan Manjari Dassi* 40 *Cal.* 871).

In a certain market the banias and other dealers under a private arrangement amongst themselves appointed some one as *Chaudhuri* of the market to regulate the business. He was remunerated by voluntary payment by them, such payments having no connection with the ordinary rents and profits of the market due to the Zemindar.

A dispute between the *Choudhuri* and the servants of the Zemindar was held not to relate to the profits of the market and as such outside the scope of section 145 (*Ram Lochan* v. *Emp.* 36 *All.* 143).

(c) Dispute relating to worship or collection of offerings in temples, etc.

Offerings at Temples, etc.

The section has been held not to apply to a dispute with respect to collections and offerings at a Kerbala (*Ghulam Sibain* v. *Mussamet Kamiz* 5 *Pat. L. J.* 246) or offerings given for the worship of a deity (*Ram Saran Pathak* 38 *Cal.* 387 *S. C.* 16 *C. W. N.* 574).

But when the dispute is in effect for possession of the temple and the right to perform puja therein is only a portion of the larger relief claimed the case comes within the section. (*Palaniyandi* 17 *Cr. L. J.* 235).

Right to perform Puja.

Where the dispute between the parties was with regard to the right to go upon the temple to perform the puja and take a portion of the offerings to the idol but there was no dispute as regards the temple or any land belonging to the idol it was held that such a right could not be said to be a right of user of any land as provided in Sec. 145 sub-Sec. 2 (*Surendro Nath* v. *Soshee Bhushan* 52 *Cal. S. C.* 42 *C. L. J.* 127)

In *Pandurang In re* 4 *Bomb. L. R.* 438 the dispute was with regard to the right to take sandalwood paste when removed from the person of an idol and it was held that the sandalwood paste did not fall within the description given in Sec. 145 (2) as forming the profits of immoveable property as it in no way arises or emanates from the temple building or in any regard can be held to be property arising from immoveable property.

Sandalwood paste case

Proceedings under the section cannot be instituted in respect of a dispute between two parties relating to the distribution of fees paid by pilgrims at Gaya for performing Sradh ceremony as such fees are not profits which issue out of land. (*Narayan Missir* v. *Bhagwan Missir* 3 *C. L. J.* 137).

Gaya Sradh offerings.

Other cases.

A dispute relating to the right to lay warps in a street has also been held not to come within the section. (*Sarkara Kylash Mudaliar* vs. *Kuthulinga Mudaliar* 19 *Cr. L. J.* 977).

Laying warps in a street.

The section has been held not to apply to a case where the dispute was one regarding the right to grow and collect lac in plum trees standing on lands comprised in the holdings of occupancy raivats. (*Ali Mohammad Mondal* vs. *Piggot* 32 *C. L. J.* 255 *S. C.* 24 *C. W. N.* 1039).

Growing and collection of lac.

(9) Cases where subject matter consists of several parts.

In some cases the component part is distinct and separable from the rest and in others the subject matter in dispute is indivisible and must be dealt with as a whole. In the case of a dispute relating to a colliery it appeared that one party was in possession of the office buildings and the other of the pits and wharves etc., which they had occupied about fourteen days prior to the commencement of the proceedings. The Magistrate considering himself bound to find who was in actual possession at the date of the commencement of the proceedings by himself passed an order in favour of the second party. It was held by Petheram C. J. and Beverley J. that the proper order to make under the circumstances of the case was one under Sec. 146 attaching the property for the second party was undoubtedly not in possession of the whole of the property in dispute and the effect of the Magistrate's order was to put them in possession of the portion that was in the possession of the other party. (*Khatras Jharia Coal Co.* 22 *Cal.* 297).

In the subsequent case of *Sardar Ali* 5 *C. W. N.* 710 it was held that if the component part is distinct and separate from the rest the Magistrate is not bound to make an order of attachment. In *Rajendro Narayan Roy* 9 *C. W. N.* 887 it has been held that when each party is found to be in possession of different portions an order of attachment cannot be made.

Where there are independent disputes relative to distinct parcels of land they ought to be dealt with in separate proceedings but where the dispute is one the fact that it embraces several parcels of land is not sufficient to necessitate an independent proceeding in respect of each. (*Krishna Kamini Chaudhurani* 6 *C. W. N.* 737 *S. C.* 30 *Cal.* 155).

Where a Magistrate drew up one proceeding in respect of several plots of lands claimed to be in the possession of different persons and the parties were not prejudiced by the Magistrate not taking separate proceedings but dealing with the matter in one and the same proceeding and where the course taken by the Magistrate did not preclude any of the parties from adducing evidence in the case concerning the different plots of land it was

held that the procedure taken by the Magistrate did not vitiate the enquiry and the order made therein. (*Iswar Chandra Chowdhury* v. *Ambica Charan Majumdar* 5 *C. W N.* 544).

Where a Magistrate in one proceeding dealt with various plots as regards which there were disputes between various sets of parties it was held that the proper procedure would be to make each the subject matter of a separate proceeding but in the absence of actual prejudice to any party there is nothing in law to prevent a joinder of all these in one proceeding. Even the failure to allocate particular plots to particular individuals does not vitiate the proceedings although it would have been more proper to do it. (*Gojadhar Mull Marwari* v. *Thakur Sing* 1923 *Pat.* 545).

In the case of a dispute about the possession of a *Chur* the fact that the contending parties were each found in occupation of different plots is not a ground for holding that a single proceeding in respect of the whole *Chur* was without jurisdiction. (*Sojani Kanto Roy* 24 *Cr. L. J.* 235).

As regards disputes relating to large areas it was pointed out by Chowdhury J. in *Indian Iron and Steel Co.* 32 *C. L. J.* 54 that when a party claims under a document or agreement the right of doing certain things over a large extent of territory the performance of acts under such alleged right in one portion of the ground over which the right extends although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit is not of itself a sufficient possession on which the Magistrate's order under Sec. 145 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession though at variance with the right. The Magistrate is not the proper forum for determining such a question. In such a case the Magistrate is to proceed under Sec. 107 Cr. P. C. Proceedings under Sec. 145 with regard to a large Mouza will cause great injustice to the persons in actual occupation. It is not the function of a Criminal Court to go into complicated questions of title and possession including that of adverse possession and of constructive possession of wide areas inferred from actual possession of limited areas.

In *Upendro Nath Bhattacharya* v. *Proshonyo Kumar Ghosh* 20 *Cr. L. J.* 17 it was observed that where there is a dispute as regards the possession of a fishery extending over several miles in length if on the evidence the Magistrate is unable to satisfy himself as to the possession of the whole length in question he should ascertain as far as he can the possession of some portion or portions thereof. As to the portion of which he is able to say who is in possession he should proceed under Sec. 145 and only as to the remainder should he proceed under Sec. 146.

(10) Within the local limits of the Magistrate's jurisdiction.

To give the Magistrate jurisdiction the property in dispute must be within the local limits of the jurisdiction of the Magistrate who proposes to take action.

A Magistrate of one district can however institute proceedings under the section on a police-report drawn up by a police officer of another district in respect of such portions of the land as lie within his jurisdiction. (*Ishan Chandra Das* 6 *C. W. N.* 378 *S. C.* 29 *Cal.* 885).

Where a *Jalkar* was situated partly within and partly without the local limits of a Magistrate' jurisdiction an order of the Magistrate with regard to that portion which lay outside it was without jurisdiction. (*Korban Mullah* vs. *Raja Srinath Roy* 1 *C. L. J.* 329).

(11) Dispute likely to cause a breach of the peace.

The power given to a Magistrate to make a binding declaration as to the possession of any property is an exceptional one and the exercise of that power is limited to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists. It is the existence of such a dispute which is the basis of the Magistrate's jurisdiction. (*Kunund Narain Bhoop* 4 *Cal.* 650 ; *Anesh Mollah* 5 *C. W. N.* 428 ; *Kalanond Sing* 15 *C. W. N* 271 ; *Shib Narain Mukherji* 24 *C. W. N.* 621).

Where the Magistrate finds that there is a *bona fide* dispute between the parties he ought to initiate proceedings under Sec. 145. (*Mani Lal* vs. *Gathi Ahir* 1925 *Pat.* 514).

If the Magistrate does not think that there is any likelihood of a breach of the peace he is in duty bound to refuse to proceed. (*Moolyallal Tapandas* vs. *Ali Mohomad Jadow* 26 *Cr. L. J.* 1333).

Grounds to be stated in the initial order.

The grounds for his belief as to the existence of a likelihood of a breach of the peace must be recorded in the initial order whether the Magistrate acts on a police report or other information. (*Kunund Narain Bhoop* 4 *Cal.* 650 ; *Kesu* 4 *C. W. N.* 57 ; *Manik* 32 *Cal.* 552 ; *Jag Mohanpal* v. *Rajkumar Ghosh* 28 *Cal.* 416 ; *Nityanondo Roy* 9 *C. W. N.* 621 *S. C.* 32 *Cal.* 771).

It has been held by a Full Bench of the Calcutta High Court that a reference in the initial order to the police-report which clearly sets out the likelihood of a breach of the peace is sufficient. (*Khosh Mahomed* 9 *C. W. N.* 1065 *S. C.* 33 *Cal.* 352 ; *S. C.* 2 *C. L. J.* 259 ; *Kuloda Kinkar Roy* 10 *C. W. N.* 257).

Such report must show sufficient materials on which the Magistrate may form his own opinion and be satisfied as to the necessity or otherwise for the initiation of the proceedings. He ought not to act for example on a police-report containing a mere statement that both parties being men of substance there might be a breach of peace. A typical case on the point arose where the dispute related to the forest produce of a certain *gar* and the contesting parties were the Maharaja of Mymensing on the one hand and the Maharaja of Natore on the other and the police submitted a report in the vaguest terms that each party claimed a certain right and that inasmuch as both the parties were men of substance there might be a breach of the peace. (*Maharaja Surya Kanto Acharya* vs. *Maharaja Jagadindro Nath Roy* 11 *C. W. N.* 198 ; See also *Maharaja Bahadur Sing* vs. *Raja Ranjit Sing* 11 *C. W. N.* 835).

But there is no inflexible rule that the police-report must show that the disputing parties are actually assembling men or doing other specific overt acts. No rule can be laid down so

much as to specify the sufficiency of the materials upon which he takes action. (*Kuloda Kinkar Roy*).

Magistrate to exercise discretion.

The Magistrate must exercise his own judgment on the matters placed before him (*Ganga Bishun Sing* 1924 *Pat.* 787) and should not take action upon a mere expression of opinion by the police. (*Kuloda Kinkar Roy* 10 *C. W. N.* 257 *Maharaj Bahadur Sing.* 11 *C. W. N.* 835).

Information other than police report.

In *Prem Sing* vs. *Emperor* 18 *Cr. L. J.* 565 it has been held that the Magistrate must record a judicial decision as to the existence of a dispute likely to cause a breach of the peace on judicial evidence placed before him. Where there is no police-report the statement of interested parties is to be received with great caution. (*Joy Mongal Sing* v. *Kanto Gope* 24 *Cr. L. J.* 304). A petition for example by a person in the employ of the petitioner that a dispute likely to cause a breach of the peace exists is perhaps not such information as can give the Magistrate jurisdiction under Sec. 145. (*Rajah of Karvetnagar* v. *Lad Govind Dass* 16 *M. L. J.* 419).

Where no breach of the peace is alleged in information.

It is absolutely necessary that the Magistrate himself should be satisfied as to the existence of a dispute likely to lead to a breach of the peace. The question arises whether the Magistrate can come to a conclusion as to the necessity of instituting proceedings under the section on a police report or other information which does not allege the likelihood of a breach of the peace. It has been held that he cannot (*Rai Radhagovindo* 6 *C. W. N.* 340 *Ramsaroop Chowdhury* 1 *Pat. L. T.* 387). The opposite view has also been taken (*Ganga Bishun Sing* 1924 *Pat.* 787) and this seems to be the correct view. Looking, by way of analogy, to the conditions requisite for the initiation of proceedings in cases of offences it appears that the only thing necessary is that the Magistrate should have before him the facts which constitute the offence in question and he is not in any way bound by the opinion of the person who brings those facts to his notice, in other words it is competent for the Magistrate to take cognizance of an offence and

issue process on the accused on a report made by a police officer to the effect that there is no case against the accused and the allegations made are false. Similarly there is no reason why the Magistrate on a consideration of the facts placed before him should not be competent to decide that it is necessary in order to prevent a breach of the peace that action should be taken under Sec. 145 in spite of the fact that the person who supplies the Magistrate with the materials is of opinion that there is no likelihood of a breach of the peace. This is undoubtedly a reasonable view to take for it is the Magistrate who is to judge and not the police officer or any interested party.

The statement of interested parties where there is no police report must be received with great caution but if the Magistrate has reason to believe such a statement he has jurisdiction to take proceedings under the section (*Joy Mongal Sing* 24 *Cr. L. J.* 300) but the Magistrate is not justified in importing his knowledge of the evidence recorded in any other proceeding into the case and assuming that a breach of the peace is likely to occur. (*Raja Hussaim* 10 *Oudh L. J.* 157).

Proceeding not to be based on personal knowledge of Magistrate.

Under the section a special jurisdiction is vested in the subordinate criminal courts under special circumstances and for a special purpose and Magistrates ought to be very careful in acting under Sec. 145 so as to guard themselves from the danger of assuming jurisdiction in cases not really contemplated by the section and where the suggested apprehension of a breach of the peace is little more than colourable and made to induce the Magistrate to deal with matters properly cognizable by the civil courts. (*Per Pigot J. in Obhoy Chander Mukherji* 10 *Cal.* 78).

Need of caution in taking action.

There must be a reasonable apprehension that a disturbance of the peace is likely to occur rendering it necessary for the Magistrate to take immediate steps to prevent it and not merely that it is probable that a breach of the peace may occur if proceedings be not taken. (*Damodar Bidyadhar* 7 *Cal.* 385).

When proceedings are struck off and fresh proceedings are taken fresh materials are necessary and the Magistrate must set forth such new material in his order and it is useless to

refer to a report called for at the time of drawing up the new proceeding and furnished after it was drawn up. (*Manik* v. *Azimuddi* 6 *C. W. N.* 923).

Proceeding during continuance of 144 order.

Proceedings under Sec. 145, it has been held, may be drawn up during the continuance of an order under Sec. 144 (*Gopala Ayar* 27 *M. L. J.* 234).

Effect of previous order under section 107.

In *Baisnab Charan Manji* 16 *C. W. N.* 384 *S. C.* 39 *Cal.* 469 it was held that the jurisdiction of the Magistrate is not ousted by the fact that one of the parties had been previously bound down under section 107.

(12) Initial order.

The initial order by which the proceeding is started must be drawn up for the recording of such an order is necessary to give the Magistrate jurisdiction. (*Krishna Kamini* 30 *Cal.* 155 *S. C.* 6 *C. W. N.* 737 *F. B.*).

An order under Sec. 145 made at the hearing of a case started as under Sec. 107 (*Sukur Dusadh* v. *Ram Prosad Sing* 33 *Cal.* 443) or as under Sec. 147 (*Subramania Pillai* v. *Sanniasi Pillai* 19 *M. L. J.* 18) is bad. But see contra *Debi Prossad* v. *Sheodat Rai* 30 *All.* 41 *S. C.* 4 *A. L. J.* 705.

In *Chowdhuri Ahir* v. *Raja Ram Sing* 4 *Pat. L. W.* 234 it has been held that it is not illegal to convert a proceeding under Sec. 144 into one under Sec. 145 where the parties are not prejudiced and are fully cognizant of the case.

Contents of the order.

In the initial order the Magistrate is to embody his reasons for coming to a conclusion as to the existence of a dispute likely to cause a breach of the peace. (See cases cited under "Dispute likely to cause a breach of the peace," Page 542). Under the circular orders of the High Court the Magistrate should in this order declare himself satisfied from a police-report or other information and for reasons given that a dispute exists which is likely to cause a breach of the peace.

Besides this, in this order the Magistrate is to require the parties concerned in the dispute to attend his court by person

or by pleader at a time fixed and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

Under the circular orders of the High Court the date should be so fixed as to allow reasonable time for the due service and return of the notice promulgating the order and the production of evidence.

The initial order or proceeding should therefore clearly describe the subject of dispute (*Shib Narain Mukherji* 24 *C. W .N.* 621), state the grounds necessitating the taking of proceedings, fix a date for receiving the written statements of the parties regarding actual possession of the disputed property which is the only matter to be decided in the case.

An order which gives no information as to the subject of the dispute and leaves the persons to whom it is issued quite in the dark as to the property in regard to which they have to set forth their respective claims is bad. (*Martin F. A. In the matter of the petition of* 27 *A.* 396 *S. C.* 1904 *A. W. N.* 234).

The subject matter of dispute must be clearly determined (*Maharaja Surya Kanto* v. *Muharaja Jagadindro Nath* 11 *C. W. N.* 198) but where the parties are not at issue upon the question as to what the disputed lands are and neither the court nor anybody concerned in the dispute was under any misapprehension as to that point there is no ground for holding that the Magistrate who tried the case had no jurisdiction to make an order under the section for want of proper dispute. (*Gordon Sims* v. *Johurv Lal* 5 *C. W. N.* 563 *see also* 27 *A.* 296 ; *see also* 7 *C. W. N.* 462 *and* 7 *C. W. N.* 558).

Can the Magistrate drop the proceedings after drawing up the initial order?

The preponderance of authority is in favour of the view that on being satisfied as to the non-existence of the likelihood of a breach of the peace, either that it did not exist at all or no longer existed, the Magistrate can drop the proceedings (*Manindro Chandra Nandi* v. *Baroda Kanta* 30 *Cal.* 112 *S. C.* 6 *C. W. N.* 417 ; *see also* 5 *C. W. N.* 428).

This view is consistent with Sub-Sec. 5 of Sec. 145.

Sub-Sec. 5 however comes into play after some one, whether a party or any other person interested, appears and shows the non-existence of the likelihood of a breach of the peace but according to the rulings cited above the Magistrate can drop the proceedings before any one appears. In other words after drawing up the proceedings the Magistrate can cancel them without giving an opportunity to the parties to show by evidence that there was a likelihood of a breach of the peace if he is satisfied that no breach of the peace exists. *Domapudi Narasia* v. *Venkiah* 49 *M. L. J.* 784).

But it is difficult to see how he can be satisfied unless some one, a party or a person interested, proves the non-existence of the dispute to his satisfaction. The proceedings have been started on a police-report or some other information which must be the application of a party who invites the Magistrate to take action under the section. Some new material must be forthcoming on which to decide that the proceedings are unnecessary. Proceedings under the section are no doubt quasi executive but once they are started they must be tried judicially. That seems to discard the idea of the Magistrate dropping the proceedings on any other material than that placed before him by a person appearing before him after the initial order has been recorded. This precludes the possibility of dropping the proceedings on a further police-report that proceedings are no longer necessary.

Service of the order.

The grounds of being satisfied as to the likelihood of a breach of the peace must not only be recorded by the Magistrate but must be served on the parties for it is the intention of the law not only that Magistrates should have sufficient grounds for proceeding under the section but that they should inform the parties concerned of the grounds on which they are proceeding. (*Q. E.* v. *Govindo Chandra Das* 20 *Cal.* 520). This is all the more necessary because under clause 5 the parties or any other interested person may show to the Magistrate that no such dispute exists and thereupon all further proceedings are to be stayed and the initial order cancelled.

A copy of the initial order is to be served as a summons on such persons as the Magistrate may direct and at least one copy is to be published by being affixed to some conspicuous place at or near the subject of dispute. In Sec. 530 of the Code of 1872 the Magistrate was to "call on all parties concerned in such dispute" to appear and file written statements.

Form of notice.

As to the form of notice to be given it was contended in *Kunund Narain Bhoop* 4 *Cal.* 650 that the law contemplated something in the way of a general citation but it was held that notice was to be given to those individuals who on the information before the Magistrate was known to be concerned in the dispute. Under the Code of 1882 the Magistrate was to draw up the initial order "requiring the parties concerned in such dispute" to attend court and file written statements. Up to this time there was no specific provision for service of the initial order and in the Code of 1898 Cl. 3 was enacted specifically providing for service but the service has to be effected on such person or persons as the Magistrate may direct. It is left to the Magistrate to direct upon whom the copy of the initial order is to be served although the initial order must call upon the parties concerned in the dispute to do the required thing. It follows then, on the wording of the section, that the Magistrate may not serve all the parties concerned in the dispute with the copy of the initial order but this cannot be the proper view. Probably the object of making Cl. 3 elastic as to the person or persons on whom notice is to be served is to enable the Magistrate to make orders in connection with the service of notice, as for example, a direction to the effect that one of a class of claimants, when the disputing parties may be conveniently grouped according to the nature of their respective claims, may be served and such service will be deemed sufficient service on all. Besides this it is difficult to put a consistent interpretation on clause 3 read with clause 1.

It has been held by a Full Bench of the Calcutta High Court that the provision as to local publication in sub-Sec. 3 is directory and a matter of procedure only but it is nevertheless the duty of the Magistrate to strictly comply with it. (*Sukh*

Lal Shekh 9 *C. W. N.* 1046—*S. C.* 33 *Cal.* 68). This decision disapproves of *Janu Manji* 8 *C. W. N.* 590 in which it was held that the provision in question is mandatory and non-compliance with it goes to the root of the jurisdiction.

The Patna High Court has held that want of service of notice under sub-Sec. 3 is a grave irregularity which vitiates the proceedings. (*Ram Sahai Chowdhuri* 19 *Cr. L. J.* 71 *S. C.* 4 *Pat. L. W.* 183).

Order without any notice.

An order under Sec. 145 without any notice to the party affected is entirely without jurisdiction. (*Sheonandan Prasad Sing* 1917 *Pat.* 200).

In *Sripati Mondal* 8 *C. W. N.* 76 one of the parties alleged that they had not received a copy of the initial order or any notice as to the date of trial but the Magistrate wihout making any investigation determined the case merely on the written statement of the other party and made an order in their favour. It was held that before proceeding with the matter the Magistrate was bound to be satisfied that the notice of the proceeding and the copy of the order drawn up by him had been duly served.

In *Sajjad Ahmad Chaudhuri* 12 *C. W. N.* 848 *S. C.* 35 *Cal.* 774 one of the parties was not served with notice under Sub-Sec. 3 nor was there any local publication nor was any written statement filed by either party but the Magistrate made an order in favour of one party after examining one witness on his behalf. The proceedings were held to be wholly irregular and were set aside.

In *Kali Ch. Kapali* 24 *C. W. N.* 902 one of the parties was absent and the Magistrate made his order on the evidence of the other party. Subsequently the absent party appeared and alleged non-receipt of notice and asked for revival of the case which was not allowed and it was held that there should have been an investigation and the High Court sent back the case for re-hearing.

A Magistrate should not accept the written return merely of the serving peon as a sufficient service of his order under Sub-Sec. 1 (*Jogendro Rai* 8 *C. W. N.* 719).

(13) Parties concerned in the dispute.

The parties concerned must be called upon by the initial order to attend court and file written statements. It has been decided by a Full Bench of the Calcutta High Court in *Krishna Kamini Chowdhurani* v. *Abdul Jabbar* 30 *Cal.* 155 *S. C.* 6 *C. W. N.* 737 that the words "parties concerned in such dispute" in Cl. 1 of Sec. 145 are intended to indicate all persons claiming to be in possession at the time of the initial order under Cl. 1 including those who not being actual disputants yet claim to be in possession and not that all parties interested in or claiming a right to the property in dispute are entitled to be and should be made parties to the proceeding. The words include persons who are interested in or claim a right to the property in dispute. An order for possession passed against a servant receiving monthly wages and in custody of the disputed property could not be treated as binding on his successor or master. (*Nagoji Row* 18 *Cr. L. J.* 44). The Magistrate taking proceedings under the section is not called upon to ascertain what persons have or claim to have mere rights to possession.

Servant receiving monthly wages.

The Magistrate has power to add parties even after the initial order under Cl. (1) until the enquiry begins and he may so add either of his own accord or on the application of parties. To add parties afterwards would lead to much inconvenience and prolong the proceedings but it is not an irregularity which will vitiate the proceedings. For a person to be concerned in a dispute it is not necessary to be actually present near the land or to have notice of the proceeding when started. (*Manmotho Nath Chatterji* 20 *C. W. N.* 978).

Addition of parties.

The general policy in the Section is to allow any interested person to come in but the Magistrate cannot be expected to get hold of all of them and therefore it is necessary to put a narrower meaning on "parties concerned" than that conveyed by "persons interested". For a person to be concerned in a dispute it is not necessary to be actually present near the land or to have had notice of the proceeding when started. (*Manmatho Nath Chatterji* 20 *C. W. N.* 978).

Manager.

A person who is in possession of land merely as manager for the actual proprietors should not be made a party to a proceeding under Sec. 145 (*Beharilal Trigunait* 21 *Cal.* 915 ; *Brown* 25 *Cal.* 423) but it has been held by a Full Bench of the Calcutta High Court that there is jurisdiction in the court under Sec. 145 to make an order in favour of a person who claims to be in possession of the disputed land as agent to or manager for the proprietors when the actual proprietors are not residents within the appellate jurisdiction of the High Court (*Dhondhuri Sing* v. *Fallet* 31 *Cal.* 48 *S. C.* 7 *C. W. N.* 825).

To make the manager of a resident landlord a party is a mere irregularity or at least an error of law and does not affect the jurisdiction of the Magistrate (*Bholanath Sing* v. *Wood* 32 *Cal.* 287).

Receiver.

A receiver appointed by a court cannot be correctly described as a party interested in a dispute likely to cause a breach of the peace and even if he can be, a Magistrate has no jurisdiction to pass an order on him under Sec. 145 without the sanction of the court that apointed him. (*Dunne* v *Kumara Chandra* 30 *Cal.* 593 *S. C.* 7 *C. W. N.* 390).

In an enquiry between old and new tenants of an estate the receiver who is not in actual possession and who only granted leases to some of the new tenants is not a necessary party. (*Maddippli Chinna* 9 *M. L. J.* 502).

Other cases.

An order in favour of him who is not a party to the proceeding is bad. (*Rameshwar Prosad* 6 *C. W. N.* 104).

Where in a proceeding between the *lakherajdar* and the *putnidar* regarding collection of rent from tenants there was a dispute as to which tenants were in possession it was held that no decision could be made in the absence of the tenants. (*Haridas Samanto* 19 *C. W. N.* 959).

Where although one of the parties to the dispute claimed title and possession of all the disputed lands which lay in several different villages the claimants on the other side were many and claimed different portions of the lands the Magistrate

would have no jurisdiction to decide the question of actual possession of the large number of items after hearing only the parties who claimed possession of one or other of them though the title of the several different claimants referred back to a common origin. (*Velu Mala Varayan* v. *Kuppuswami Pillai* 22 *Cr. L. J.* 90).

Party who is a minor.

Where one of the interested parties is a minor and he is not served with notice the proceedings though bad in law as against him are not without jurisdiction as regards the other parties. (*Nandan Sing* v. *Siaram Sing* 26 *Cr. L. J.* 1289).

Party's attendence if can be compelled.

A Magistrate has no jurisdiction to issue a warrant to compel the attendance of a party in a proceeding under Sec. 145. (*Kefatullah* 5 *C. W. N.* 71).

(14) Actual possession of the subject of dispute.

It is only actual possession that the section contemplates and the Magistrate must confine himself to a consideration of that question alone. He has to find which of the parties is in actual possession of the subject matter of dispute. (*Ambler* v. *Pushong* 11 *Cal.* 365).

"Numerous reported cases have abundantly shown that in acting under Sec. 145 Magistrates do not properly appreciate their responsibilities. The object of this section is to enable a Magistrate when a breach of the peace is likely to take place in consequence of a dispute regarding any land or water or the boundaries thereof to settle the matter in dispute temporarily, that is, until the contending parties shall have had their rights determined by a competent court. It is not the duty of a Magistrate to determine such rights but too often in such proceedings the Magistrate loses sight of the real point for his determination and allows issues to be raised and evidence taken regarding rights in the subject matter in dispute instead of confining himself to the determination of the fact of actual possession thereof. His duty is to find and maintain actual possession 'without reference to the merits of the claims of any

of such parties to a right to possess the subject of dispute'." (*Prinsep's Commentary 14th Edition*).

Continuous possession.

The section only deals with rights of absolute continuous possession of immoveable property and will not cover a case where one party claims a right to a site and the opposite party claims a right to carry on public worship without disturbance only on a certain day in the year (*Manik Chandra* 17 *C. W. N.* 205). The element of continuity of possession is an ingredient which is necessary at any rate in cases where interruption is not due to reasonable variation and therefore the section does not apply to the case of a dispute between the proprietors and a stall-holder in a market as to the possession by the stall-holder of a stall once every week. (*Nayan Manjari Dassi* 49 *Cal.* 871).

Intermittent encroachment.

Any intermittent encroachment on the part of a tenant on the adjoining jungle of the landlord cannot affect the title or possession of the superior landlord. (*Bhola Nath Sing* v. *Wood* 32 *Cal.* 287).

Possession by receipt of rent.

In a case of disputed possession between two rival landlords possession by receipt of rent as also possession by the landlord's immediate tenant is actual possession within the meaning of the section (*Burkis Bibi* 17 *M. L. J.* 251, *Srish Chandra* 38 *Cal.* 889).

In an earlier case (*Empress* v. *Thakur Dayal Sing* 3 *Cal.* 320) it had been held that constructive possession through intermediate holders is not such possession as is contemplated by the section.

Where the rents in kind in a village are exclusively collected by the Lambardar and the other co-sharers are only entitled to a certain share a dispute about the shares of the co-sharers is not a dispute about possession which is admittedly with the Lambardar. (*King Emp.* v. *Ram Bhajan* 23 *Cr. L. J.* 650).

Dispute as to who is landlord.

Where the real dispute is as to whether the tenants in possession are the tenants of the one party or the other neither of the parties being in actual physical possession the section ought not to be applied. (*Atmarem* 23 *Cr. L. J.* 166).

The possession given by an Amin in a *batwara* proceeding is simply one of ownership and not of occupancy and such possession cannot prevail under the section. (*Mackenzia* 4 *Cal.* 378).

Possession given in Batwara proceeding.

The nature of actual possession may vary according to the nature of the disputed property. In case of forest land for example it is necessary to enquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same on the occasion immediately preceding the one on which the dispute arose (*Jagat Kishore Acharya* 16 *Cal.* 281).

Nature of actual possession may vary.

(15) Joint possession.

The object of the section is to put an end to the dispute which is likely to lead to a breach of the peace by making a declaration as to which party is in actual possession to the exclusion of the other. Therefore when the parties are in joint possession no declaration under the section can be made. If a breach of the peace is likely to take place the Magistrate is competent to take other measures to prevent it, leaving the contending parties to settle their disputes in the civil court. The section only contemplates disputes as to the possession of definite pieces of land or the rents and profits issuing from definite pieces of land. A Magistrate cannot proceed under the section where the disputed property is itself an undivided share in land or rent or profit issuing from an undivided share because in such a case the subject matter of the dispute is uncertain and its boundaries undefined. If both parties claim joint possession there is an end of the matter so far as Sec. 145 is concerned inasmuch as there is no room for any enquiry under the section. If none of the parties claim actual possession the Magistrate cannot adjudge actual possession in favour of any one of them and therefore he cannot hold an enquiry under the section the only object of which is to find out who is in actual possession.

Where both parties claim joint possession.

The Magistrate is competent to proceed with the enquiry if one of the parties claims actual possession. There may be

cases of dispute relating to joint property where one party claims joint possession and the other exclusive and where each party claims exclusive possession. Under the section the Magistrate is to come to a conclusion as to actual possession without reference to the merits of the claims of any of the parties. That being so the question whether the parties have a joint title to the property in dispute is entirely foreign to an enquiry under the section.

(1) Section if altogether inapplicable to joint property.

Property to which two co-sharers have joint rights may be in the actual possession of one of the parties to the exclusion of the other and should such possession be declared under the section? Judicial opinion on the subject has not been uniform and the point is not free from difficulty.

The answer was given in the negative in the ingenious argument advanced on behalf of the petitioner in the case of *Basanto Kumari Dasi* 40 *Cal.* 982 *S. C.* 17 *C. W. N.* 944. Under Sec. 145 the party found to be in possession is to remain in possession until evicted in due course of law The idea of transference of possession is made clear by the form (No. 22) prescribed in the Code for the purpose of a declaration under the section in which it is stated that the party found to be in possession is entitled to retain possession until ousted by due course of law. Ouster of a co-owner is an impossibility. What then is the result? Will a co-owner once declared to be in possession under Sec. 145 remain ever in possession by virtue of an order under the section? The other co-sharer cannot oust him or evict him in due course of law and the section enjoins that an order made thereunder in favour of a party will hold good so long as eviction in due course of law is not effected. That such permanent consequences irremediable in a court of civil jurisdiction should at all flow from Magisterial orders intended for preventing a breach of the peace could never be the intention of the legislature.

Does it follow then that joint property is altogether excluded from the operation of the section? The objection to accepting this conclusion as pointed out by Coxe J. in the case of *Basanto Kumari* is that the very property which is most prolific

of disputes leading to a breach of the peace is excluded and in the opinion of Harington J. the eviction can be effected by a suit for partition.

(2) Where one party claims joint possession and the other exclusive possession.

Empress on the prosecution of Deno Nath Ghatak v. *Raj Coomar Sing I. L. R. 3 Cal.* 573 (1878) may be cited in support of the view that the Magistrate has no jurisdiction to make an order under the section in respect of joint property even if one of the parties is in exclusive possession thereof.

(a) Nawbut Khana Case.

In this case generally known as the Nawbut Khana case decided under the Code of 1872 a piece of land was the joint property of Gopee Kisto Goswami and Shama Charan Lahiri and in consequence of the latter having erected a Nawbut Khana, a platform for musicians resting on bamboo posts, on a portion of the land a dispute arose and an enquiry under Sec. 530 was held. The Magistrate adjudged exclusive possession of that part of the land to the party who had erected the Nawbut Khana. It was held by Jackson J. that the order of the Magistrate was erroneous as the dispute was one to which Sec. 530 could not apply.

It does not appear whether each of the parties claimed exclusive possession of the portion of the land on which the Nawbut Khana had been erected or one claimed exclusive possession and the other joint possession but the fact remains that the dispute related to joint property which was found to be in the exclusive possession of one of the parties and a declaration of such possession under Sec. 530 was held to be erroneous.

(b) Tarujan Bibi v. Asamuddi Bepari 4 C. W. N. 426.

Tarujan Bibi v. *Asamuddi Bepari* 4 *C. W. N.* 426 lays down that section 145 does not apply where one party claims joint possession and the other exclusive possession. The section contemplates a dispute between two parties each of which asserts the right to hold actual possession of property as against the other

The case of the first party Tarujan Bibi was that the second party Asamuddi was her deceased husband's younger brother, that she and Asamuddi had been living on the ancestral home-

stead and enjoying their respective lands separately but Asamuddi wanted to deprive her of her share of the ancestral lands and so there was a likelihood of a breach of the peace.

The case of the second party Asamuddi was that Tarujan and her children were not entitled to any portion of the ancestral lands, but had been living jointly with him in the same house and were maintained by him. On the evidence the Magistrate found "The whole of the ancestral lands were held jointly both by Tarujan and Asamuddi but not separately. In such cases the inference is that the male member of the family holds actual possession of the lands and manages them on behalf of the female member." The following final order was made by the Magistrate—"The court therefore declares that both Tarujan and Asamuddi are entitled to joint possession of the lands in dispute and that Asamuddi will hold actual possession of them till evicted therefrom by due course of law."

It was held by Prinsep and Stanley J.J. that "on the face of it this is not an order under Sec. 145. It has the appearance rather of a decree in a civil suit adjudicating the rights of contending parties whereas an order under Sec. 145 should be merely to declare whom the Magistrate finds to be in actual possession of the property in dispute regarding which proceedings have been taken to prevent a breach of the peace. Here the Magistrate finds that two persons are entitled to joint possession. That is a matter entirely beyond his jurisdiction.

He next declares that one of the parties shall hold actual possession but the Magistrate does not base that order on any finding that he and he alone had actual possession when he took cognizance of the matter in dispute under Sec. 145.

In his explanation on service of this rule the Magistrate represents that the two parties are in joint possession of the property in dispute and that one of them is trying to evict the other so as to endanger the public peace. That is not a matter which can be properly dealt with under Sec. 145. If a breach of the peace is likely to take place the Magistrate is competent to take other measures to prevent it leaving the contending parties to settle their disputes in the civil court if they cannot settle them amicably.

Sec. 145 contemplates a dispute between two parties each of which asserts the rights to hold actual possession of a property as against the other and not a dispute between a party claiming to hold joint possession and another contesting such right."

The judgment proceeds on the assumption that Tarujan claimed actual possession and Asamuddi joint possession, that in fact both were entitled to joint possession and were in joint possession. In these circumstances Sec. 145 was held not to cover the case. There is no doubt that Tarujan claimed separate possession but it is difficult to understand how Asamuddi in the case set up by him did not do the same. He never admitted the title of Tarujan and his case was that she and her children had no sort of title to the property but was allowed to live in his house and were maintained by him as an act of charity.

Asamuddi totally denied Tarujan's title and his case must be taken to be that it was he and he alone who was in possession. The mere mention that Tarujan was living jointly with him cannot alter the character of his claim to the land.

This then was a case in which both parties claimed exclusive possession. However that may be it was actually found that they were in joint possession.

In spite of the general observation that section 145 does not apply to a dispute between a party claiming to hold joint possession and another contesting such right there is indication in the judgment that the conclusion might have been different if the Magistrate found that one of the parties had actual possession as in the Nawbut Khana case. As pointed out in *Narayana Asari vs. Kandasami Asari* 16 *Cr. L. J.* 525 section 145 is concerned with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. Therefore in proceedings under that section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant.

The law as laid down in Tarujan Bibi's case, apart from the facts of the case, is that section 145 cannot apply to a dispute between a party claiming to hold joint possession and another contesting such right. The section contemplates a dispute

between two parties each of which asserts the right to hold actual possession of property as against the other. The same view was taken in *Krishto Alhadini* v. *Radha Shyam Pandey* 7 *C. W. N.* 118. In *Emp.* v. *Dabendro Nath Bose* 1 *C. L. J.* 632 the contrary view was taken and the section was held to be applicable where one party claimed exclusive possession and the other joint.

Joint possession ousts the jurisdiction of the Magistrate but when the dispute relates to a definite plot of land and the question is whether the plot is included in a piece of land which is in the exclusive possession of one of the parties or in another which is the joint property of both the parties in dispute the Magistrate has jurisdiction to proceed under section 145. (*Mon Mohan Ghose* v. *Rajendro Coomar Ghose* 7 *C. W. N.* 462. *Denomoni Chowdhurani* v. *Mozaffar Ali Khan* 5 *C. W. N.* 105).

A declaration similar to that made by the Magistrate in Tarujan Bibi's case was sought in the Madras case of *Kandasami Asari* v. *Narayan Asari* 16 *Cr. L. J.* 52. The second party in this case admitted that the Hakdars of the temple in dispute consisted of members of both of the petitioner's sub-caste and of the respondent's sub-caste. They did not allege that their sub-caste Hakdars alone were entitled to the exclusive possession and management of the temple, on the other hand they merely wanted a declaration that the temple was the common property of all Asarias. This it was held could not be done under the section.

In *Sankara Kylash Mudaliar* v. *Kuthulinga Mudaliar* 10 *Cr. L. J.* 977 it was held that sections 145, 146 authorise no recognition of joint possession and no order can be passed forbidding one of the parties to interfere with the joint possession by both.

In *Kinu Mondal* 23 *C. W. N.* 1051 it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself both parties being members of the same family and the Magistrate declared the second party to be in possession of the disputed land. It was held that the order of the Magistrate was without jurisdiction.

In *Jogeshvar Das* v. *Trilochan Das* 1919 *Pat.* 479 it was laid down that no proceedings under section 145 ought to be drawn up in a case when the parties are in joint possession although they held specific shares therein.

The first party claimed sixteen annas of the disputed lands as in his exclusive possession, the record of rights being in the name of his elder brother. The second party claimed that the lands were originally *ejmali* and that subsequently by a private partition they got a portion of the disputed lands while the first party got the remainder. The trying Magistrate found that the first party had one third share in some of the disputed lands and had one half share in some other lands and that the second party had possession of the remaining portion of the disputed land and directed that they be maintained in their respective possession until evicted in due course of law.

In *Nando Kessore Missar* v. *Kabka Missar* 24 *Cr. L. J.* 869 it was held that where in a dispute concerning property the Magistrate finds that it is joint property and in the joint possession of the parties he has no jurisdiction.

(3) Each party claiming exclusive possession.

Makhan Lal Roy v Baroda Kanto 11 C. W. N. 512.

Makhanlal Roy v. *Baroda Kanto Roy* 11 *C. W. N.* 512 totally excludes the operation of section 145 in cases where the dispute relates to joint property irrespective of the claims of the parties as to possession. In order that a distute may properly come within the purview of the section it must be by two opposing parties having adverse rights to exclusive possession and a dispute between two parties having joint rights to the land in dispute each of which is claiming possession is not a matter which can be determined under the section.

Possession by a co-owner is not adverse to the other and if it is essential under section 145 that each party must set up adverse right to exclusive possession it follows that joint property is totally excluded from the operation of the section. One of the co-owners may be in actual possession but such possession cannot be the subject matter of a declaration under the section.

The judgment of Brett and Gupta J. J. was as follows:—

"The property in dispute seems to be two huts constructed in a compound common to both parties. The two parties are brothers and it is suggested that they are in exclusive possession of certain portions of the masonry homestead. The dispute however is about two mat huts which have been constructed outside the masonry building on what seems to be the common homestead ground and the question is whether a dispute of this sort is one which a Magistrate has jurisdiction to entertain under Sec. 145. In our opinion it is not.

The land on which the huts stand being in joint possession of the two disputants and there having been no real partition of the homestead land though there has been apparently an attempt to partition it by arbitration it cannot be said that the dispute is between two opposing parties having adverse rights to exclusive possession of the land. The dispute is between two parties having joint rights to the land in dispute each of which is claiming exclusive possession. This is not in our opinion a matter which could be determined under Sec. 145."

According to this judgment the dispute related to two huts constructed in a compound common to both parties. The land on which the huts stood was in the joint possession of both parties. Although the parties claimed exclusive possession no one was in fact in such possession of the land and the structure raised thereon. Given these facts the conclusion arrived at by the learned judges was inevitable that Sec. 145 had no application as laid down in the previous cases. But it appears from the Magistrate's judgment set out in the report that the petitioner Makhan was the son of the elder brother of the opposite party Baroda and Baroda occupied the western and Makhan the eastern half of the common family dwelling house. The dispute was about two huts recently built in front of the western half of the common dwelling house and both Baroda and Makhan claimed to have erected them. The trying Magistrate found that "sometime ago arbitrators were appointed by the parties to partition the house and homestead and it appeared from a notice issued by the arbitrators that the partition was

completed. But I have failed to lay hold of the partition papers. It seems to me however that the *chalas* have been built by Baroda and are in his possession. They are in front of the dwelling house and I cannot believe that he allowed Makhan to build them. The evidence adduced points to the same conclusion."

It comes to this then that the huts in question were in the exclusive possession of one of the parties and necessarily the land on which they stood but this land belonged to the two parties, in other words both parties had joint title to the land although it was in the actual possession of one of them.

The High Court holds that the very fact that the parties had joint rights to the land in dispute ousted the jurisdiction of the Magistrate but this statement of the law is coupled with a statement of fact to the effect that the parties were in joint possession. There is no doubt that the finding of the Magistrate was just the opposite. The High Court was reversing the proceedings under its special powers under the charter in the exercise of which it was not competent for it to examine the evidence and come to a separate finding as in an appeal or ordinary revision. However that may be, the finding is there that the parties were in joint possession and such a finding by itself necessitates the reversal of the Magistrate's order. But the judgment goes further and lays down that the fact of the parties having joint rights to the land in dispute ousts the jurisdiction of the Magistrate even if the parties claim each to be in exclusive possession.

As it is, it must be taken that their Lordships came to a definite finding that the land in dispute was in the joint possession of both parties and taking the operative part of the judgment as a whole it comes to this.—The dispute is between two parties having joint rights to the land in dispute each of which is claiming exclusive possession but both of which are in fact in joint possession. This is not a matter which could be determined under Sec. 145.

As pointed out above as soon as the finding of joint possession comes in the importance of all other matters dealt with in the judgment vanishes.

The tendency of judicial decisions has since the passing of the earliest Code of Criminal Procedure been to exclude disputes relating to joint property from the operation of Sec. 145 as much as possible and it was this which led to sweeping generalisations being made in judgments regardless of the facts of the case in which they were pronounced. The climax was reached in the case of Makhanlal Ray. The importance of the matter is beyond question as no property is so apt to occasion a breach of the peace as the property of an undivided or incompletely divided family.

To say that exclusive possession of a co-owner cannot be declared under the section because both parties have joint rights to the land in dispute is tantamount to saying that in an enquiry under Sec. 145 title is the paramount thing to look to, a line of action which the statute expressly forbids. To give effect to such a view would be to hold an enquiry under the section for the purpose of finding out who is in possession due regard being had to the merits of the claims of the parties although in so many words the legislature has ordered that such enquiry shall be held without reference to the merits of the claims of the parties. On the other hand for a Magistrate to make an order maintaining a party in possession to the exclusion of another who under the law is fully entitled to have possession along with the other is more like usurpation of the functions of a civil court and interference with civil rights by Magistrates in proceedings of a summary character wholly unsuited for the determination of civil rights. On the authority of the case of Makhanlal Ray it was decided in *Bholanath Chakravarti* v. *Peary Sarma* 11 *C. L. J.* 412 that where the dispute is with regard to possession of a share in a fishery and the two parties are found to have joint rights in the same neither of them can be considered as claiming exclusive possession and therefore Sec. 145 is inapplicable.

(4) Opposite view

The contrary view was asserted in *Gurudas Kundu* vs. *Kedar Nath Kundu* 38 *Cal.* 889 and a dispute between two sets of joint owners each claiming exclusive possession of the land forming part of the joint estate through their respective tenants was held to be

within the scope of the section. In this view an order declaring the exclusive possession of a tenant of one party was not without jurisdiction. The matter was discussed at length in *Basanta Kumari Dasi* v. *Mohesh Chandra Saha* 40 *Cal.* 982 *S. C.* 17 *C. W. N.* 944.

Gurudas Kundu v Kedarnath Kundu 38 Cal. 889.

It is laid down that Sec. 145 applies to a case where the dispute is between co-sharers each claiming to be in possession of the disputed land to the exclusion of the other. The question whether the parties have a joint title to the land is one which the Magistrate cannot investigate under Sec. 145. The only question for him is whether either party has actual possession and if he finds that one party has actual possession of a definite area and the other party has not he can make an order irrespective of the title of the parties.

Basanto Kumari Dasi v. Mahesh Chandra Saha 40 Cal. 982 S. C. 17 C. W. N. 944.

The first and second party were members of the same family and resided in the *ejmali* family dwelling house each occupying a specific portion of the house. The dispute which gave rise to a likelihood of a breach of the peace related to two plots within the premises. Each party claimed to be in possession of the plots in dispute to the exclusion of the other.

For the petitioners it was contended on the authority of *Makhanlal Roy vs. Baroda Kanto Roy* 11 *C. W. N.* 512 that as the land was *ejmali* no order could be made under Sec. 145. Then again Sec. 145 says that one of the parties is to retain possession until evicted in due course of law. There is no such thing as evicting a co-sharer from the joint property in due course of law.

For the opposite party it was argued that an order could be made under the section if it was found that either party was in actual possession of the disputed plots whether the land was *ejmali* or not.

With reference to the case cited above Harington J. observed that "the judgment could be supported in the view that the land on which the huts stood was not in the exclusive possession of either party but as stated in the judgment of the High Court

in the joint possession of both the parties and added that the decision did not involve the wider proposition contended for by the petitioner. No doubt there were expressious in the judgment which supported the proposition but it was not necessary as a ground for the decision."

Coxe J. pointed out that when property is found as a fact to be not constructively but actually in the joint possession of the parties the section cannot apply. In the case cited the learned judges found distinctly that the parties were in joint possession, and having arrived at that finding the rest of the decision was inevitable.

As regards the argument advanced before the court that as there could be no eviction of a co-sharer from joint property in due course of law no order under the section could be made in respect of such property, Harington J. observed—"The argument is a fallacious one. No doubt the party out of possession could not maintain ejectment against his co-owner in possession. If he sued claiming a declaration of his title and joint possession and obtained a decree he would not under that decree be able to evict the other party. But if he sued for partition, established his title to a share of the property in dispute, got his share partitioned by metes and bounds and adjudged to him, that would amount to an eviction of the other party in due course of law from that portion of the lands in dispute to which the plaintiff was found entitled. It is a fallacy therefore to say that sub-Sec. (6) makes it impossible to apply Sec. 145 in cases where the parties are jointly entitled to the land because a joint owner out of possession cannot evict a joint owner in possession. He can evict him from his share of the lands—not by a suit in ejectment but by a suit for partition. I am disposed to think that Sub-Sec. (6) was purposely drafted, as it is, so as to make it impossible for a joint owner out of possession to get it under a decree giving him joint possession—as such a proceeding would probably bring about the very breach of the peace which Sec. 145 is designed to prevent."

Coxe J expressed himself on the point as follows—"It has been argued that the use of the word "evicted" in the last

Sub-sec. of Sec. 145 and of the word "ousted" in Form 22 shows that the section was not intended to apply to property to which the parties had a joint title inasmuch as in such a case the remedy of the defeated party would be a suit not for eviction but for joint possession. My learned brother has pointed out that this does not necessarily follow and has explained the introduction of the word "evicted" into the section. Unless this explanation is accepted it appears to me that we are forced to the conclusion that the use of the words "evicted" and "ousted" must be a mere oversight in drafting. It must be admitted that so slight a slip might be made. On the other hand it is inconceivable that the legislature really intended to exclude from the operation of Sec. 145 the very property which is most prolific of disputes leading to a breach of the peace."

This case then lays down that Sec. 145 applies to a case where the dispute is between co-sharers each claiming to be in possession of the disputed land to the exclusion of the other.

Sub-sec. (6) does not make it impossible to apply Sec. 145 in cases where the parties are jointly entitled to the land in question.

The question whether the parties have a joint title to the land is one which the Magistrate cannot investigate under Sec. 145 Cr. P. C.

The only question for him is whether either party has actual possession and if he finds that one party has actual possession of a defined area and the other party has not he can make an order irrespective of the title of the parties."

Baijnath Marwari v. W.S. Street 20 C W. N. 518.

The decision in this case has been followed in *Baijnath Marwari* vs. *W. S. Street* 20 *C. W. N.* 518 where it has been held that the mere fact that there may be a joint title to the land would not prevent the application of Sec. 145.

Malan v. Makhan Sing 2 Lahore 372.

In *Malan* vs. *Makhan Sing* 2 *Lahore* 372 the Lahore High Court has approved of this view of the law and held that a Magistrate would be acting with great irregularity in not enquiring into the question of disputed possession simply because the parties are jointly

entitled to the land in question or the revenue records showed the holding to be joint where the various joint owners had held separate portions of the joint holding for themselves each one being in actual possession of a definite portion.

Joy Mangal Sing v. Kanto Gope 24 Cr. L. J. 304.

To the same effect is *Joy Mangal Sing* vs. *Kanto Gope* 24 *Cr. L. J.* 304 which holds that even though the contending parties are co-sharers where it is found that one of them is in sole possession of the land in dispute the Magistrate has jurisdiction.

Bansdeo Sing v. Mahadeo Lal 1925 Pat. 618.

Where two persons took a joint lease of certain lands and subsequently disputes having arisen one party claiming 14 annas share and the other alleging 8 annas each the Magistrate drew up proceedings under Sec. 145 regarding the disputed items of 6 annas share, it was held that the Magistrate had jurisdiction, the criterion in such cases being whether the parties claim separate possession of the land in dispute. (*Bansdeo Sing* vs. *Mahadeo-lal* 1925 *Pat.* 618 *S. C.* 26 *Cr. L. J.* 1187.)

Collection of rent of joint undivided states.

Ram Rangini Dassi v. Gooroodas Roy 18 W. R. Cr. 36.

Disputes frequently arise over the collection of rent of joint undivided estates and the earliest reported decision on the subject given under the Code of 1861 was *Ramrangini Dassi* v. *Gooroo-das Roy* 18 *W. R. Cr.* 36. It held that Sec. 318 referred only to disputes concerning land but not to a dispute as to the right to collect the rents of a joint undivided estate in a certain proportion.

Beni Narain v. Acharj Nath 5 All 607.

In *Beni Narain* vs. *Acharj Nath* 5 All. 607 there was a dispute existing between one of the co-sharers of an undivided estate and the lessees of another co-sharer as to the right of the latter to collect rent such right being denied on the ground that the lessor was not in possession of her share. An enquiry was made under Chap. XII. of the Code and the lessor was

declared to be in possession of her share. It was held that the provisions of that chapter were not applicable to the dispute in question.

Surb Narain Sing v. Birj Mohan Thakur 23 Cal. 80.

In *Surb Narain Sing* vs. *Birj Mohan Thakur* 23 *Cal.* 80 it was pointed out that to bring a case under Sec. 145 the property which is the subject of dispute must be capable of being accurately defined and therefore a dispute as to the right to realise rent in respect not of the whole sixteen annas but only of an undivided share of any tract of land was not a dispute concerning trangible immoveable property within the meaning of Sec. 145 Cr. P. C.

Sri Mohan Thakur v. Narshing Mohan Thakur 27 Cal. 259 S. C. 4 C. W. N. 420.

In *Sri Mohan Thakur* vs. *Narshing Mohan Thakur* 27 *Cal.* 259 *S. C.* 4 *C. W. N.* 420 it was however held that a dispute as to collection of rent between joint owners of a Mitakshara family comes within the section. The owners of the property in dispute were the son and grandson of one Brojo Mohan Thakur who were members of a Mitakshara family. They appointed a person to collect the rents of the property. One of the co-owners claimed to have dismissed the person so appointed to collect the rents and to go in and collect the rent himself direct. There was no dispute as to the shares but the dispute was as to the right to go in and collect the rents and break up the management by which the rents were collected on behalf of all. It was held that the Magistrate had jurisdiction to make an order under Sec. 145 in the case.

Srish Chandra v Fakir Chandra 38 Cal. 889 S. C. 15 Cal. L. J. 184.

In *Srish Chandra* v. *Fakir Chandra* 38 *Cal.* 889 *S. C.* 15 *C. L. J.* 184 it was held that an order passed in favour of one tenant against other persons setting up the tenancy is a good and valid order and it does not transgress the principle applied in 11 C. W. N. 512 (Makhan Lal Roy). Where one set of landlords claim exclusive possession of land through their tenants and a similar rival claim is set up by a different set of landlords through their tenants the dispute is one which comes properly within Sec. 145.

(5) Partnership business.

Radha Raman Ghosh v. Baliram Ram 32 Cal 249 S. C. 8 C. W. N. 885.

In *Radha Raman Ghosh* v. *Baliram Ram* 32 *Cal.* 249 *S. C.* 8 *C. W. N.* 885 in consequence of a dispute relating to the management of a colliery which was a partnership business proceedings under Sec. 145 were instituted by the Magistrate but were quashed by the High Court

The first party Radharaman Ghosh was owner of a four annas share and the second party of the remaining twelve annas share of a colliery. Under the terms of the deed of partnership one Basdeo Ram was appointed manager but this arrangement was altered by a revised partnership deed in which Radha Raman Ghosh first party was appointed manager jointly with another person of the second party. It was contended by the second party that Radha Raman Ghosh never exercised the *de facto* management and only recently got possession by a ruse whereas Radha Raman averred that he had been the virtual manager under the second deed of partnership and that the other man was only a paid servant acting under his instructions. In this state of things on a police-report about imminence of a breach of the peace proceedings were instituted and on objection being taken as to their competency the Magistrate found that both parties claimed exclusive possession of the property in dispute and the parties did not claim possession as managers but as proprietors and the proceedings were appropriate.

Their Lordships in quashing the proceeding observed—"If the parties do not claim possession as managers on what can their claim to possession be founded? The partners in a business must jointly own and possess the partnership property. Each has a right to enter the premises and take a share of the profits. There is no allegation of ouster of possession apart from the question of management. If the latter question be left out of consideration there is really no dispute to be adjudicated on. And if the Magistrate were to declare either party in exclusive possession it is clear that that party would be worsted in a suit upon title and consequent right of joint possession.

The partners may of course agree to limit their own control of the business by appointing a manager but in that case the

manager becomes the servant of all the partners and their possession is not taken away by his appointment. Thus it appears that the claim to exclusive possession in this case is quite illusory and meaningless unless it refers to the management only which is a question outside the purview of Sec. 145."

(6) Debuttor property.

Nritya Gopal Sing v. Chandi Charan Sing 10 C. W. N. 1088.

Debuttor property being by nature impartible and inalienable the possession of *co-shebaits* must necessarily be always joint and as such beyond the scope of the order under Sec. 145 Cr. P. C. (*Nritya Gopal Sing* v. *Chandi Charan Sing* 10 *C. W. N.* 1088).

The possession of one of several *co-shebaits* who for convenience has been entrusted with the sole management of the Debuttor estate is as regards the Shebaiti right of his *co-shebaits* that of an agent. The agency can be withdrawn. A dispute between such a person claiming sole management and his *co-shebaits* who have withdrawn the agency and claim to have joint management with him is not a fit subject for a proceeding under Sec. 145. (*Nritya Gopal Sing*).

(7) Order pending partition suit.

Dharani Kanto Lahiry v. Girija Kanto Lahiry 8 C. W. N. 485.

Where in a suit for partition certain properties have been declared to be joint and partition has been ordered to be effected the properties must until that jointness is disturbed by actual partition in the suit be treated as having been declared by the civil court to be joint. No order under Sec. 145 can be made whilst the suit is still pending in regard to such properties. (*Dharani Kanto Lahiry Chowdhury* v. *Girija Kanto Lahiry Chowdhury* 8 *C. W. N.* 485).

(16) Enquiry as to possession without reference to merits.

((*a*) *Actual possession without reference to merits.*

The decision as to actual possession must be arrived at by the Magistrate without reference to the merits of the claims of

any of the parties to a right to possession. The title to possession joint or separate is foreign to the enquiry which must be confined to actual possession of one or other of the parties. (*Basanto Kumari Devi* 40 *Cal.* 982 *S. C.* 17 *C. W. N.* 944).

The rights of parties cannot legitimately be the subject of enquiry in proceedings under Sec. 145 which is concerned solely with the fact of actual possession whether lawful or unlawful. (*Bhagwan Das* 25 *Cr. L. J.* 78).

(*b*) *When title may be looked into.*

If there is substantial evidence of possession on that question the Magistrate may be justified in looking into the evidence of title in corroboration of the evidence of possession. (*Per Pontiffex J. in Kali Kristo Thakur* 7 *Cal.* 46). The title can be looked into only to arrive at a satisfactory conclusion on the question of evidence and not apart from it. (*Ram Saroop Chowdhury* 1 *Pat. L. Times* 387).

Documents of title should only be utilised for elucidation of the oral evidence admitted in the case and should not by themselves be used for concluding the question of possession (*Sreman Vedan Raja* 38 *M. L. J.* 73) ; evidence of title can only be considered to enable a Magistrate to come to a finding as to user but where a Magistrate finds actual user with both parties it cannot be afterwards used as supplementing the evidence of user on one side when the evidence of user is conflicting so as to justify a finding of user on the side on which title is proved (*Panagati Parthu Sarathy* 34 *Mad.* 138) ; the Magistrate can use evidence of title to supplement evidence of possession to determine the truth as to the evidence as to possession (*Ramesh Chandra Sircar* 22 *Cr. L. J.* 350). Where a Magistrate finds the evidence on both sides which in itself is reliable, equally balanced and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession on one side by the presumption as to possession arising from the title which he finds in that side. But the principle does not apply in a case when the Magistrate finds that the evidence on both sides is equally unreliable. (*Akhoy Kumar Bhattacharya* 26 *C. W. N.* 1000).

The Magistrate is not entirely precluded from receiving any evidence whatever as to the title of the parties. "That possession should follow title is a reasonable and natural presumption and if a Magistrate uses evidence of title merely in order to guide and assist his mind in coming to a decision upon the question of possession he is not transgressing the provisions of law by using evidence of title for this limited purpose but if instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of title alone he is clearly doing that which the law has forbidden him to do." (*Per Field J. in Kali Kristo Thakur* 7 *Cal.* 46).

The mere fact that the Magistrate considers and discusses the question of title as bearing upon the question of actual possession does not invalidate his decision provided there is evidence as to who is in possession. (*Raja Babu* 14 *Cal.* 169). On the other hand there may be cases in which it is absolutely necessary to consider the documentary evidence in order to decide the question and when the dispute was between lessors under the Patnidars and Durputnidars regarding mineral rights refusal to accept or consider documentary evidence was held to vitiate the proceedings. (*Sheikh Sajaddi Mandal* 22 *C. W. N.* 499).

(c) Proceeding not to be tried as a civil suit.

Sec. 145 is a self-contained section and the procedure to be followed in trying a proceeding under the section is that laid down in the section. Such a proceeding is not to be tried as a civil suit with issues framed. (*Kochai Fakir* 12 *C. W. N.* 773).

(d) Magistrate shall peruse written statements.

This is the first thing to be done. The next is to hear the parties. The perusal of the written statements will enable the Magistrate to be in a position to appreciate what the parties may say in the course of the hearing. It may be that the written statements of the parties will show that the case is one which calls for the application of Cl. (5), there being no dispute

between the parties likely to cause a breach of the peace. If that is so it will not be necessary for the Magistrate to proceed further save and except to record an order under Cl. (5) staying all further proceedings on the ground mentioned in that clause. The Magistrate cannot make a final order under Cl. (4) in favour of any party on written statements alone; there must be some evidence on which to make that final order but it does not follow that an order under Cl. (5) staying further proceedings cannot be made on written statements alone.

If the written statement is not put in on the day fixed by the initial order the Magistrate may in his discretion refuse an application for time to file such written statements (*Govindo Chandra Chakravarti* 8 *C. W. N.* 642). But the very object of the section which is to put an end to disputes as to possession of immoveable property so as to prevent a breach of the peace cannot be gained until all the contending parties are on the record and an opportunity is given to them to put forward their respective claims. The effect of an order rejecting the written statement of certain parties is that the decision under Sec. 145 will not be binding upon them (*Raghunath Karr* 5 *Pat. L. T.* 458) and notice must be given to the parties in sufficient time to enable them to file written statements (*Romesh Ch. Sen* 19 *Cr. L. J.* 799).

(*e*) *Hear the parties.*

The next step is to hear the parties. Refusing to hear a party if he appears is to act in excess of jurisdiction. (*Jitan Sing* 1917 *Pat.* 18).

It may be that in some cases the Magistrate need not proceed further than this stage being convinced as to the propriety of dropping the proceedings on the ground of non-existence of the likelihood of a breach of the peace. The perusal of the written statements coupled with the submissions made by the parties may suffice to show that proceedings should be dropped. If however the circumstances do not call for an order terminating the proceedings the Magistrate proceeds to the next step to receive the evidence produced by the parties. The steps that

are to be taken have been very carefully laid down by the legislature and the order in which they are to be taken has been fixed with special reference to the fact that likelihood of a breach of the peace is the basis of the Magistrate's jurisdiction but the full significance and importance of this provision is, more often than not, overlooked.

To interpret the expression "hear the parties" coming in immediately after "peruse the statements so put in" and before "receive all such evidence as may be produced by them" as meaning that the Magistrate is to hear the evidence of the parties and arguments of lawyers on their behalf (*Ghulam* I. *Pat. L. J.* 246) is not to lay down something which the Magistrate has not got to do but is to miss the proper significance which the legislature certainly intended the words to convey. That the Magistrate should hear arguments after evidence has been led in by the parties follows as a matter of general principle and it has very properly been held that a Magistrate's refusal to hear arguments of counsel or pleaders of parties vitiates the final order. (*Dhabari Mia* 5 *Pat. L. W.* 103).

Under the section the Magistrate is (1) to peruse the written statements and then (2) to hear the parties. The parties may point out to the Magistrate that there is no dispute likely to cause a breach of the peace or that the dispute is of such a nature that the section does not apply and no action thereunder can be taken, for example, it relates to property which admittedly on the written statements filed is in the joint possession of co-sharers or that the necessary parties are not before the court or that admittedly the property in dispute is beyond the local limits of the Magistrate's jurisdiction.

All these questions can be discussed and if raised have to be disposed of by the Magistrate before he proceeds further. For all practical purposes this hearing before taking evidence may be called a preliminary hearing which may dispose of the case or lead to the other stages of the enquiry contemplated by the section. It is incumbent on the Magistrate to hold this preliminary hearing otherwise all subsequent action will be *ultra vires*.

After this hearing given to the parties the Magistrate is to take evidence produced by the parties, consider the effect of that evidence and decide which of the parties is in actual possession of the disputed property. The decision under the section must be judicial and not arbitrary and must be arrived at after giving each of the disputants an opportunity of being heard. (*Velu Malavarayan* 22 *Cr. L. J.* 90).

Receive all such evidence as may be produced by the parties.

The evidence is to be produced by the parties on a date to be fixed by the Magistrate after perusing written statements.

Under Sec. 340 Cl. (2) a party to a proceeding under Sec. 145 may offer himself as a witness in such proceedings.

(*f*) *All evidence adduced must be taken.*

In section 530 of the Code of 1872 the explanation appended to the section laid down that the question of possession must be decided on evidence taken before him (the Magistrate).

In 1882 section 145 enacted that the Magistrate "shall receive the evidence produced by them (the parties) respectively." The same are the words used in the Code of 1898.

The words were interpreted to mean that the Magistrate was bound to take all the evidence produced and it was held that an order made without receiving all the evidence the parties wanted to produce was without jurisdiction. (*Manmatho Nath Mitter* v. *Baroda Prosad Roy Chowdhury* 31 *Cal.* 685 ; *Kingal* 11 *A. L. J.* 586).

The Magistrate should take all the evidence tendered by the parties and decide the question of possession on such evidence. The requirement of law that the Magistrate must take the evidence produced by the parties before making the final order is not satisfied by the examination of a person who was not the witness of either party (*Khubi* 22 *Cr. L. J.* 481) and an order passed on the evidence of such person only is bad (*See* 8 *C. W. N.* 719).

The amending Act (XVIII) of 1923 has altered the words to "shall receive all such evidence as may be produced by them."

The words now used make it clear beyond all doubt that the Magistrate is bound to take all the evidence produced by the parties and he cannot shut out any. The rulings to the effect that a Magistrate can limit the number of witnessess for good and sufficient reason are no longer operative.

Magistrate must himself take the evidence.

The Magistrate must himself take the evidence and conduct the enquiry and it will not do for him to act merely upon the report of a subordinate officer made on enquiry (*Sardar Prasad* 10 *A. L. J.* 465 ; *Zar Ali Shah* v. *Rahim Shah* 21 *Cr. L. J.* 563).

An order made on evidence recorded by a subordinate Magistrate under orders is without jurisdiction (*Arumeja Govindo* v. *Venkata Sibain* 31 *Mad.* 82 *S. C.* 17 *M. L. J.* 535).

Evidence to be recorded in the presence of parties.

An order made on evidence recorded at a time when one of the parties was not on the record is illegal. (*Narayan* v. *Chandra* 26 *Cr. L. J.* 1289).

(*g*) *Opportunity to adduce evidence and court's duty in dealing with evidence.*

Proper opportunity should be given to the parties to produce their evidence. (*Gouri Shankar* v. *Collector of Muzeffurpur* 6 *Pat. L. T.* 215).

In order that the parties may be in a position to produce their evidence notice of the place where the trial is to take place if it is to be held anywhere other than the place where the Magistrate ordinarily holds his court must be given in sufficient time to the parties. (*Kali Nath Mistri* v. *Akhoy Behari* 7 *C. W. N.* 705).

The Magistrate should grant a reasonable adjournment to the parties to present their case before him and not make an order of attachment on the ground of no evidence as to possession. (*Monra Khan Sing* 1 *Pat. L. W.* 55).

An order made without giving a party opportunity to examine a material witness summoned but who failed to appear is without jurisdiction. (*Guzibddi Howlader* 18 *C. W. N.* 94).

Where after an *ex parte* decision the party in whose absence an order had been made against him appeared and alleged non-service of notice it was held that the Magistrate should have enquired into the matter with a view to reopen the case (*Kali Chandra Kapali* v. *Abdul Laskar* 24 *C. W. N.* 902).

Where in a proceeding under Sec. 145 Cr. P. C. the land in dispute having been attached the date of the hearing was fixed for 15th January and the first party who had not been served with notice until the 8th of January appeared in court and applied for time to file a written statement but the Magistrate refused time and tried the case *ex parte* and made an order in favour of the second party it was held that the proceedings were not conducted quite fairly to the first party and the order of the Magistrate was set aside. (*Ramesh Ch. Sen* v. *Alijuddi Shikh* 19 *Cr. L. J.* 799).

Where a Magistrate made an order under Sec. 145 without giving either party an opportunity of adducing oral evidence as to possession his order was held liable to be set aside. (*Sakhayur Ali* v. *Alhadi Hazi* 21 *C. W. N.* 928 *S. C.* 27 *C. L. J.* 88).

Final order to be made on evidence.

The final order must be made on evidence. It cannot be made merely on the perusal of the written statements without examining the witnesses that are ready. (*Kolha Koer* v. *Munneswar Tewari* 34 *Cal.* 840).

Evidence may be both oral and documentary.

Such evidence may be both oral and documentary. Documentary evidence does not necessarily mean evidence of title, it may as well be evidence bearing on the question of actual possession. Pottahs and Kist receipts have been held to be good evidence of possession and are not to be rejected as evidence of right merely. (*Thylayee Ammal* 31 *M. L. T.* 202 *S. C.* 43 *M. L. J.* 624).

The Magistrate must consider both oral and documentary evidence produced. (*Kailash Behary Lal* 1 *P. L. T.* 991).

That he has so considered the evidence must appear on the face of the judgment.

From a consideration of the evidence produced by the parties the Magistrate may think that some further evidence is necessary and such evidence he may cause to be produced under Sec. 540. The final order is to be made on a consideration of the entire evidence, that adduced by the parties and that called by the court.

There may be cases in which it is absolutely necessary to consider the documentary evidence in order to decide the question of possession.

In a case in which the dispute was between lessors under the Putnidars and Durputnidars regarding mineral rights the Magistrate refused to accept or consider documentary evidence. This was held to vitiate the proceeding. (*Shaikh Sajeddi Mandal* 22 *C. W. N.* 499).

A converse case is to be found in *Jutham Sing* 18 *C. W. N.* 700 when the Magistrate illegally refused to examine any witness and decided the case on documentary evidence dating back to the years before the date of the proceeding.

In *Ambica Nath Roy* 23 *C. W. N.* 910 the order of attachment made by the Magistrate was set aside on the ground that it was made without specially referring in the judgment to the important documentary evidence of possession on the record.

Where in a proceeding under Sec. 145 it appeared that a proper appreciation of the oral evidence in the case regarding possession was impossible in the absence of important documents and the Magistrate refused to grant any adjournment for the production of the documents it was held that the order of the Magistrate was arbitrary and amounted to a denial of justice. (*Biswambhar Ray* 25 *C. W. N.* 602 *S. C.* 33 *C. L. J.* 507).

(*i*) *Date of hearing.*

A Magistrate should take all the evidence produced on the day of hearing and unless he considers it necessary for good

reason to require further evidence he should decide then and there, if he can which party is in actual possession. (*Haripodo Mandal* 17 *C. W. N.* 144).

What is meant by the date of hearing? Is it the date fixed for filing the written statement or the subsequent date fixed for evidence? It ought to mean the latter.

By the initial order the parties are called upon to file written statements only. To hold that the parties must be ready with their evidence on the date fixed for filing written statements is to lay down a proposition not warranted by Cl. (1) of the section which nowhere says that the evidence must be produced on that date. It follows therefore that after perusing the written statements and hearing the parties the Magistrate is to fix a date for the parties to adduce evidence in support of their respective claims.

It is incumbent on the Magistrate to dispose of proceedings under Sec. 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self-contained section.

(j) Procedure of summons case to be followed.

The procedure for the trial of a case under Sec. 145 is that laid down for the trial of a summons case. (*Harendro Narayan Sing* 11 *Cal.* 762). Witnesses are examined, cross-examined and re-examined and then discharged. It is wrong procedure to examine the witnesses of one side in chief reserving their cross-examination until all of them had been examined in chief and until that side had closed its case. If the cross-examination of a witness had been reserved the evidence of such witness cannot be acted upon till an opportunity had been afforded for such cross-examination. (*Moti Sing* 1923 *Pat.* 33). It is highly desirable that once the hearing is commenced and witnesses are examined the hearing should go on from day to day until all the evidence is taken and argument is heard and then the order should be passed as soon as possible. (*Sastu Sahu* 1924 *Pat.* 689).

Although there is nothing in Sec. 145 to suggest which party should begin the case it is usual for the second party to begin his case. (*Ram Prossad Shahu* v. *Emp.* 21 *Cr. L. J.* 136).

(k) Ex parte enquiry.

A Magistrate can proceed *ex parte* in a proceeding under Sec. 145 but it is not competent for him to pass order in favour of the party present without some evidence that such party is in possession. (*Ram Kristo Patro* 6 *C. W. N.* 929 ; *Gobindo Chandra Chakraverty* 8 *C. W. N.* 642). Even in the case of an *ex parte* proceeding there must be some recorded evidence to justify the order passed by him. (High Court circular order, Criminal).

(l) No evidence on either side.

The police-report is not admissible in evidence as to the factum of possession (*Kulharesh Narain* 1 *Pat. L. Times* 501) and the Magistrate cannot declare one party in possession merely on the written statement filed by such party (*Najir Mirdha* 12 *C. W. N.* 771 ; *Kefatullah* 5 *C. W. N.* 71 ; *Dya Wappa Basgunda* 17 *Bomb. L. R.* 382) nor can he attach the property under Sec. 146 without any evidence or local enquiry. (*Sheo Balak Rai* 40 *Cal.* 105 *S. C.* 16 *C. W. N.* 1052).

A final order made on local enquiry and the judgment in a previous criminal case without taking any evidence is an order made on no evidence and is therefore bad (*Gogan Howladar* 25 *C. W. N.* 1007) ; equally bad is an order made on local enquiry and the evidence of persons picked up by the Magistrate in the course of such enquiry. (*Khubir Sing* 1921 *Pat.* 167 *S. C.* 22 *Cr. L. J.* 481). An order based on evidence recorded at a time when one of the parties was not on the record at all has been held to be illegal. (*Narayana* v. *Chandrabhaga* 26 *Cr. L. J.* 1289).

Where no evidence is adduced the Magistrate cannot pass an order in favour of one of the parties. (*Hatimali Chaprashi* 24 *Cr. L. J.* 702). An order without giving either party opportunity to adduce oral evidence is bad. (*Sukhayur Ali* 21 *C. W. N.* 928). In a case where both parties appeared on the day of hearing but did not file any written statements or produce any evidence but asked for time and the Magistrate did not allow adjournment but heard the parties and made an order

of attachment under Sec. 146 it was held that the Magistrate ought to have granted time to allow regular proceedings to be followed or he might have informed himself of the facts of the case either by local enquiry under Sec. 148 or in other ways. (*Shaikh Mansur Ali* 12 *C. W. N.* 896).

(*m*) *Order on Local inspection only.*

A decision of a Magistrate based purely on what the Magistrate himself saw, heard and inferred at the local enquiry about all of which there was nothing on the record is not a decision legally found. (*Lalbehary Saha vs. Bejoy Shankar Sikdar* 10 *C. W. N.* 181).

The Magistrate cannot refuse to take evidence and make the final order on the result of local inspection of the land in dispute. (*Sreman Vidan Raja* 38 *Mad. L. J.* 73 ; *Jhabba* 13 *Cr. L. J.* 396).

Where before taking evidence the Magistrate made local inspection merely to see the exact land in dispute and its features and all that was done was to inspect the locality, make a note of what the disputed area was and prepare a plan and every thing was placed on the record it was held that the Magistrate acted entirely within his jurisdiction. (*Lachmi Narain* 24 *Cr. L. J.* 507).

In *Sriman Vidan Raja* 38 *M. L. J.* 73 noted above the dispute related to a tract of forest land and the Magistrate inspected the locality and being of opinion that the inspection completely satisfied him as to the point in issue, *viz.*, the fact of actual possession, declined to take oral evidence and passed an order after discussing the documentary evidence (showing title to the property) filed in the case. It was held that he acted within his jurisdiction by treating as evidence the report of a local enquiry and deciding the case on that report (*Piziruddin Mullah vs. Tolajunnessa Bibi* 14 *Cr. L. J.* 302) but in *Shahadat Khan vs. Taijuddi Shiikh* 43 *Cal.* 1056 *S. C.* 23 *C. W. N.* 750 it was held that where in a proceeding under section 145 the Magistrate on the application of both parties held a local investigation and without taking any evidence made the final order the Magistrate's order was without jurisdiction.

(*n*) *Admission of party.*

Although it is ordinarily necessary to record evidence in a case under section 145 Cr. P. C. before the passing of final orders it has been held that the Magistrate can act on the admission of a party against whom order is made without any enquiry. (*Gangadharam Ayar* 9 *M. L. T.* 91). In one case the Mukhtar of one of the parties orally denied their claim to the disputed land though no such denial had been made in their written statement and it was held that admission by the legal practitioner conducting the case was sufficient in a quasi legal proceeding of this nature. (*Hara Mohan Sardar* 7 *C. W. N.* 351).

(*o*) *Arbitration.*

In proceedings under section 145 a reference to arbitration is not contemplated. The scheme of section 145 is against the view that a reference to arbitration and the award thereon can be made the basis of an order under the section. (*Uttim Sing* v. *Jodhan Rai* 1924 *Pat.* 589).

Proceedings under the section being intended to safeguard the interests of the public in reference to disputes concerning the possession of land the person charged with holding the enquiry under the section has no right or power to delegate the duty to hold the enquiry to ascertain the facts to any other person (*Hamidal Huk* v. *Shikh Atart Hussain* 2 *Pat. L. J.* 86)

The Magistrate has to make an enquiry himself and to pass the order after applying his judicial mind to the facts of the case and to the evidence adduced by the parties. He cannot divest himself of the case by delegating the decision to arbitrators even though appointed by consent of parties. (*Hari Prosad Tewari* v. *Sewak Das* 1917 *Pat.* 251).

The section directs the Magistrate to receive evidence himself and in consideration of such evidence to decide the question of actual possession. (*Jamna Das Kijriwala* 25 *C. W. N.* 719 *S. C.* 33 *Cal. L. J.* 388. See also 32 *Cal.* 552).

But if the parties had privately referred the dispute to arbitration and the award of the arbitrators had been accepted

by both the Magistrate would have ground for proceeding under sub-section 5 of section 145. (*Jumna Das Kijriwala Ibid*). Reference to arbitration by the court even with the consent of parties is improper. (*Hamidul Huk* 2 *Pat. L. J.* 86 ; *Hari Prosad Tewari* 1 *Pat. L. W.* 748). But where the dispute was referred by the parties to arbitration and the award was accepted and no evidence was offered by the party aggrieved the final order based on the award was held to be good. (*Haldar Sing* 3 *Pat. L. J.* 249).

The parties to a proceeding under sction 145 Cr. P. C. asked to refer the dispute to an arbitrator who was to decide which of them was in possession. The Magistrate consented and pending the decision of the arbitrators attached the properties in dispute under section 146. An award was made by the arbitrator deciding the question of actual possession and it was held that the Magistrate ought to take the finding of the arbitrator as to the fact of possession into consideration in bringing the proceedings to a legal termination. (*Taramoni Chowdhurani* 7 *C. W. N.* 461).

(*p*) *Compromise.*

A compromise can only be taken by the Magistrate as evidence for an order under sub-section (5) and cannot be made the basis of an order under sub-section (6). (*Uttim Sing* 3 *Pat.* 388).

(*N.B.*—See further note under sub-section 6).

A compromise entered into in a proceeding under section 145 does not create any title in any of the parties inasmuch as the question in such proceedings is one of possession only and none of the parties is estopped from denying the right of the other. (*Gopi Das* 45 *All.* 162 *S. C.* 20 *A. L. J.* 932).

Where after a compromise in which one of the parties agreed not to disturb the possession of the other but subsequently broke the agreement and the Magistrate passed an order prohibiting such disturbance of possession it was held that the proceedings were in continuation of the order made previously and there was no irregularity (*Bansi Gir* 23 *Cr. L. J.* 724) but

it has also been held that where once proceedings have been dropped the Magistrate cannot reopen them and go on with the case without a fresh proceeding. (See note under sub-section 5).

(q) *Process on witnesses.*

The amending Act of 1923 has for the first time introduced in clause 9 the provision that the Magistrate may at any stage of the proceedings on the application of either party issue a summons on a witness directing him to attend or produce any document or thing. It had however been held from before that the duty of a Magistrate is to assist the parties for the production of evidence and he should not arbitrarily refuse to issue processes. (*Horendro Narayan Sing Chowdhury* 11 *Cal* 762 ; *Ram Chandra Das* 21 *Cal.* 29 ; *Surja Kanto Acharya* 7 *C. W. N.* 404).

In *Harendro Narain Sing Chowdhury* 11 *Cal.* 762 the second party by two applications applied for summons on 99 and 114 witnesses respectively. Both applications were refused by the Magistrate without any stated reasons. Prinsep and Grant J.J. observed—"The terms of section 145 are somewhat obscure in this respect. They merely declare that on the day of trial the Magistrate shall receive the evidence produced by the parties respectively. It is nowhere declared in the Code whether these proceedings are to be regarded as what is known as summons cases or as warrant cases but we are inclined to think that from their nature they should be regarded on all points of procedure as summons cases. We think however that although it is altogether discretional with the Magistrate to issue summons on the witnessess cited by each party in such a case at the same time when any one of the parties comes at a proper time before him and asks for processes to secure the attendance of his witnesses the Magistrate should not arbitrarily refuse his assistance as he has apparently done in the present case. The applications for summons were in this case made on the 31st March and the cases were not decided until the 7th May so that there was ample opportunity to serve the summons. The

Magistrate however has on one application stated "The parties must produce their own witnessess. This is an application to summon no less than 99 witnesses in a proceeding under section 145" and on the other he recorded a similar order the number of witnesses being 114 instead of 99 But the number of witnesses summoned is not necessarily a reason for refusing to grant a process. If the parties had produced 99 and 114 witnesses in court the Magistrate would have been bound to examine them. This is no reason to refuse an application for summons simply because a large number of witnesses is mentioned therein."

In *Ram Chandra Das vs. Monmohon Roy* 21 *Cal.* 29 the second party applied for summons against 34 witnesses but the Magistrate summoned only five.

It was held by Trevelyan and Rampini J.J. that as the application was made seven days before the case of the second party began there was ample time to serve the processes, at any rate it was impossible to say that this application for process was made for the purpose of vexation and delay and the second party was entitled to have a chance of having their witnesses in court.

In *Surya Kanto Acharya* v *Hem Chandra Chowdhuri* 30 *Cal.* 508 *S. C.* 7 *C. W. N.* 404 decided under the Code of 1898 which excluded orders under section 145 from the ordinary revisional jurisdiction of the High Court under sections 435, 439 the Magistrate refused to issue summonses to the witnesses of a party to a proceeding and the result was that the party was deprived of a hearing on the only question for the determination of the court and thus there was a denial of justice. It was held by Stephen and Henderson J. J. that the Magistrate acted without jurisdiction.

The contrary view has also been taken that the Magistrate is not bound to compel the attendance of a witness. (*Harendro Kumar Bose* 38 *Cal.* 24 ; *Hari Podo Mandal* 17 *C. W. N.* 144).

There is no provision in the Code which makes the procedure laid down for summons cases applicable to proceedings under section 145 and the parties cannot claim it as a matter of right that it is obligatory upon the Magistrate to assist them to produce their evidence by issuing summons or processes upon

their witnesses. (*Tarapado Biswas* v. *Nurul Huq* 32 *Cal.* 1093 *S. C.* 2 *C. L. J.* 280).

It is sufficient if he takes all the evidence that the parties have ready and hear what they have to say (*Arjun Mahton* 23 *Cr. L. J.* 275).

Under clause 9, however, enacted for the first time in 1923 the Magistrate may issue process if he thinks fit so that the matter is still left to the discretion of the Magistrate and no imperative rule is laid down.

All process should be served at the expense of the crown. (*Mt. Phutania* 25 *Cr. L. J.* 1109).

(r) *Mode of recording evidence.*

The mode of recording evidence in section 145 case is laid down in section 356 ; a mere memorandum of evidence is not sufficient the provisions of sub-section 1 of section 356 being imperative. (*Sadanondo Mondal* 42 *Cal.* 381 *S. C.* 19 *C. W. N.* 124).

Under section 360 as the evidence of each witness is completed it shall be read over to him but such reading over need not be in the presence of the parties. (*Norendro Chandro Rudra Pal* 29 *C. W. N.* 701 *F. B.*). Sec. 360 lays down that the evidence is to be read over to the witness in the presence of the accused and the majority of the Full Bench in the case referred to holds that the parties to a proceeding under section 145 are not accused persons and therefore their presence is not necessary at the time of the reading over but the other part of the provision that the deposition shall be read over to the witness must be followed. So far as this is concerned the decision of the judicial committee in *Rahaman* v. *Emp.* 31 *C. W. N.* 271 is important.

The conclusion arrived at does not seem to be quite consistent with the use of the word accused in the various parts of the Code.

It has been held that it is within the jurisdiction of a Magistrate to decide a case under section 145 upon evidence partly recorded by his predecessor and partly by himself even if

the parties demanded a *de novo hearing*. (*Sondi Sing* 25 *Cr. L. J.* 89). Proviso (*a*) to section 350 is to the effect that in any trial the accused may when the second Magistrate commences his proceedings demand that the witnessess or any of them be resummoned and reheard. This right is given to the accused only and in a trial.

(17) Point of time at which possession is to be found.

The Magistrate is to decide whether any and which of the parties was at the date of the order by which proceedings were drawn up in possession of the subject of dispute. Under the Code of 1882 the Magistrate was to decide "whether any and which of the parties is then in such possession of the said subject." The use of the word "then" might be said to point to the time when the enquiry was being held in other words evidence taken and considered but it was held in some cases that in law the time of the enquiry was the time when the proceeding was started. In the Code of 1898 "then" was changed to "at the date of the order before mentioned" (*i.e.*, in Cl. 1) thus making it clear beyond doubt that the enquiry is to be directed towards finding out who was in actual possession at the date when the proceeding under section 145 was drawn up.

145 proceeding following 144 order.

What is the position if the proceeding drawn up immediately follows an order under section 144 against *the parties*? This was considered in *Jayanti Kumar Mukherji vs. Middliton* 27 *Cal.* 785 *S. C.* 4 *C. W. N.* 562. It was held on evidence of possession antecedent to the order under section 144 that the possession continued during the time the order was in force (during which period the parties could not exercise any rights of possession) and up to the date when the proceeding under section 145 was drawn up. (See also *Srinath Roy vs. Probhat Chandra Chatterji* 18 *Cr. L. J.* 301).

(18) Dispossession within two months of the proceeding.

The dispossession contemplated must be forcible and wrongful. (*Rampabitar Sing* 23 *Cr. L. J.* 379)

It has been held that when the dispossession is effected by a show of criminal force by a person having title to the property to intimidate persons in possession and to deter them from resistance the latter were forcibly dispossessed within the meaning of the proviso.

Dispossession may be wrongful and yet not forcible. A dispossession otherwise than in due course of law is wrongful. It is not necessary that actual force or violence should have been used to some person or persons before a dispossession can be said to be "forcible." (*Sita Nath Shaha* 25 *C. W. N.* 601).

The words "wrongful" in Sec. 145 Cl. (4) does not involve that the dispossessor has no legal right to the possession of the property. The distinction is between forcible entries which are rightful and forcible entries which are wrongful and this depends on whether the person entering is entitled to use force and not merely on whether he has a legal right to possession The words "forcibly and wrongfully" have the same meaning as forcible entry without due warrant of law under the English statute. A forcible entry must be wrongful unless it is in execution of a legal process. (*Bai Jiba vs. Chandulal Ambalal* 27 *Bomb. L. R.* 1353).

The dispossession must be effective dispossession. A stealthy act of ploughing and sowing when the opposite party was absent in the most haphazard manner cannot be held to be an act of dispossession. (*Ram Narain Sing* 23 *Cr. L. J.* 125).

Where in a proceeding under Sec. 145 it appeared that one of the parties within two months from the commencement of the proceeding obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then in possession it was held that it was forcible and wrongful dispossession within the meaning of sub-section 4 (1). (*Monmotho Nath Chatterji* v. *Ganga Giri Gossain* 20 *C. W. N.* 978).

A curious misapplication of this proviso is to be found in *Satyendro Nath Banerji vs. Krishnanando Adhicary* 20 *C. W. N.* 1014 where the Magistrate made the final order in favour of one party finding that as there could not be an act of peaceful possession within two months of the date of the proceeding

owing to the land being under water the possession of the current year was to be presumed in favour of the man who was in possession during previous years. It was held that the order was in direct contravention of Sec. 145 (4) and the Magistrate should have passed an order of attachment under Sec. 146.

The first proviso to clause 4 of Sec. 145 merely recites a circumstance under which the presumption of possession may be made in favour of one of the disputants. It does not debar the Magistrate from deciding the question of actual possession on other grounds also. In any case a Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to *i e.*, if he takes action under the section even when the petitioner alleges that dispossession had taken place more than two months prior to the initiation of the proceedings (*Sheoraj Sing* v. *Emp.* 11 *A. L. J.* 305).

(19) Previous determination by a competent court, effect of.

When the rights of the parties have been determined by a competent court the dispute is at an end and it is the duty of the Magistrate to maintain the rights of the successful party. (*Govindo Chandra Moitra* 6 *Cal.* 835; *Amriteswari Devi* 7 *C. W. N.* 558 ; *Gordon Sims* 5 *C. W. N.* 563 ; *Rai Mohan Roy* v. *Wise* 16 *W. R. Cr.* 24 ; *Modholal Brithol* 6 *C. W. N.* 841 ; *Krishna Alhadini Dassi* 7 *C. W. N.* 118).

This ought to be the guiding principle but there has been a considerable deviation from it in the reported cases in which in laying stress on the duty of the Magistrate to find out actual possession the vital point seems to have been overlooked that the existence of a dispute is the basis of the Magistrate's jurisdiction and the decision of a civil court must be taken to have settled the dispute in a manner best suited to secure the ends of justice.

But it has been held by a recent Full Bench of the Calcutta High Court that there may be a "dispute" within the meaning of the section even after the decision of the Civil Court (*Agni Kumar* 32 *C. W. N.*)

(*a*) *Previous adjudication by the Civil Court*

Criminal Courts should follow the decree of the Civil Court and give effect to the same.

Even a summary decision under the Land Registration Act should be respected (*Krishna* 7 *C. W. N.* 118).

The Magistrate should uphold possession given by a civil court so that a person who has obtained a decree declaring his right to possession and had been put in possession might not find himself again forced to litigate his title. (*Kedar Prassanno Lahiri* v. *Lalit Mondal* 2 *C. L. J* 147).

It is not for the Magistrate to question the validity of a decree that has not been set aside by a competent court. He cannot ignore it though the court passing the decree had no jurisdiction over the land. (*Abhoy Mandal* 27 *C. W. N.* 267 *S. C.* 37 *C. L. J.* 256 ; *Tufani Lal* v. *Mt. Bibi Umatool Rasool* 1924 *Pat.* 765).

In a proceeding under Sec. 145 Cr. P. C. concerning a land which was purchased and of which delivery of possession was obtained by a decree-holder the judgment debtor should not be allowed to retain possession of the same as against the decree-holder auction purchaser so as to drive him back to the civil court for a further declaration of his right even though it is found that the decree-holder was never in actual possession and the judgment debtor grew crops upon the land. (*Atul Hazra* v. *Uma Charan Chongdar* 20 *C. W. N.* 796 23 *C. L. J.* 555).

It is the Magistrate's duty to uphold and carry out the decree of a civil court so far as lies in him to do so. A civil court decreed redemption of certain shares in a Zamindari. The mortgagee claimed to remain in cultivatory possession of certain plots of land contending that the decree of the civil court did not affect his rights as a tenant. Upon a dispute for possession arising between the tenant and the mortgagor's representatives it was held that the Magistrate had jurisdiction to pass an order under Sec. 145. (*Baldeo Baksh Sing* v. *Raj Ballam Sing* 2 *A. L. J.* 274).

As to decrees not *interparties* different views have been taken. *Sims* v. *Johry Lal* 5 *C. W. N.* 563 is authority for the proposition that it is not necessary that the decree should be a decree for possession as between the parties to the proceeding under Sec. 145. On the other hand in *Jagabandu Shahu* 13

Cr. L. J. 583 *and Promoda Sundari Dassi* vs. *Khetro Bag* 25 *Cr. L. J.* 1104 it has been held that decrees not interparties are not binding on a criminal court in a proceeding under Sec. 145 Cr. P. C.

Decrees of courts so far as third parties are concerned may have different values in different cases.

Where there has been a real contest between the parties to a suit and upon adjudication regarding title or possession a party has been awarded a decree and put in possession in execution of such decree it may not be enough for the party claiming adversely to such a decree to show that he was not a party to it. (*Atul Chandra Mandal* 23 *C. W. N.* 982 *S. C.* 30 *C. L.* 126 *Per Huda J.*)

In the same case it is pointed out by Huda J. that cases of money decrees followed by sale of properties would stand on a different footing In those cases the sale in execution passes only the right title and interest of the judgment debtor. Consequently there is no adjudication regarding his title to the property except that an attachment gives rise to a claim and there is an adjudication on such claim or where the delivery of possession leads to an investigation under Or 21 Rules 97 to 100 of the Civil Procedure Code.

Where the first party was put in possession of the disputed property under the decree of a civil court which was not one against the second party it was held that the Magistrate had jurisdiction in a proceeding under Sec. 145 to declare the possession of the second party. (*Jagabandu Saha* v. *Raj Kumar Roy* 13 *Cr. L. J.* 583).

The validity of the effectiveness of the delivery of possession under Or 21 R. 95 C. P. C. cannot be disputed in a proceeding under Sec. 145 because the purchaser is put into actual possession by the court (*Kamala Prossad Sing* 24 *Cr. L. J.* 241) and in such a case the Magistrate acts illegally and without jurisdiction in starting a case under Sec. 145 and not upholding the civil court's decree and delivery of possession which under Or 21 R. 35 is not symbolical but actual. (*Behari Gir* v. *Rani Bhubaneshari Koer* 5 *Pat. L. J.* 104).

Decision under the Land Registration Act.

Even a summary decision under the Land Registration Act is entitled to the same respect as a civil court decree. (*Kulbansh Narain* 1 *Pat L. J.* 50 ; *Babulal Misser* vs. *Manager Bethea Raj* 1 *Pat. L. J.* 588).

Where there was no dispute in the Land Registration case and the question of *benami* is raised the principle becomes inapplicable and the court must decide the question of possession on the entire evidence adduced in the case. The question of *benami* can however be left for decision by a competent civil court. (*Kulbansh Narain ibid*).

Where there was no adjudication of possession by the revenue courts in the Land Registration proceedings and they refused to register the name of a particular party on the ground that he was neither a proprietor not mortgager the Magistrate in a proceeding under section 145 was bound to determine as to which of the parties was in actual and physical possession of the property in dispute. (*Babulal Missir* v. *Manager Bethea Raj*).

Entry in Record of Rights.

As to the effect of an entry in the record of rights see *Mahant Krishna Dayal Gir* 1 *Pat. L. W.* 642 ; *Profulla Nath Tagore* 21 *C. W. N.* 1059 ; *Syed Sadek* 37 *C. L. J.* 128 ; *Tufanilal* 1924 *Pat.* 765 ; *Chintamoni Jina* 19 *C. W. N.* 123).

Entries in record of rights by themselves do not establish the factum of possession (*Chintamani Jena* 19 *C. W. N.* 128).

Where the record of rights comes in favour of the petitioners it is undoubtedly a most important piece of evidence with the presumption of correctness which attaches to it by law. But the presumption might be rebutted by subsequent decrees of the civil court and delivery of possession that followed them. (*Tufani Lal* 1924 *Pat.* 765).

Orders under the Survey Act and B. T. Act.

In *Syed Sadek* 37 *C. L. J.* 128 it has however been held that a Magistrate in deciding a dispute under section 145 can go behind orders passed under the Survey Act and under the Bengal Tenancy Act based on the survey proceedings. The Magistrate's

order would amount to a finding that the presumption arising from the entry in the Record of Rights has been rebutted.

Batwara proceeding.

The possession given by an Amin in a batwara proceeding is simply one of ownership. (*Makenzie* 4 *Cal.* 378).

Recent Decrees.

It may be that the decree was made a long time ago and possession has been disturbed since the passing of the decree but where the decree has been made within a time not remote from the initiation of the proceedings there cannot be any question as to the duty of the Magistrate to follow it (*Daulat Koer* 26 *Cal.* 625 *S. C.* 3 *C. W. N.* 461 ; *Durganando Ojha* 25 *Cr. L. J.* 88 *Rambarai Rai vs. Sagina Rai* 24 *Cr. L. J.* 939), unless and until there was something shown which might induce the Magistrate to hold that subsequent to such delivery of possession something had happened which would have the effect of dispossessing that party. (*Rambarai Rai* 1923 *Pat.* 437).

In *Kunja Behari Dass* 6 *C. W. N.* 38 the proceeding was instituted only two months after the decree of the civil court in execution of which symbolical possession was given and it was held that the Magistrate was bound to follow it.

In *Lowson Santal* 8 *C. W. N.* 719 the decree had been made in favour of one of the parties many years ago and the Magistrate considering that it was conclusive on the question of possession refused to receive oral evidence from the other party and it was held that the Magistrate ought to have taken evidence.

In *Kuloda Kinkar Roy* 10 *C. W. N.* 257 which bristles with sweeping generalisations on many important points arising under Sec. 145 it has been laid down that there is no inflexible rule of law that a Magistrate in deciding the question of possession is concluded by every previous order of a civil or criminal court relating to the subject of dispute but the weight to be attached to any such previous order must depend upon the facts and circumstances of the particular case.

To the same effect is *Atul Chandra Mandal* 23 *C. W. N.* 982

Per Walmsley J.; Parmeshwar Sing 1917 *Pat.;* Kedar Nath 24 *Cr. L. J.* 467 ; *Bhuban Raut* v. *Kumar Rai* 1924 *Pat.* 509.

In Shankar v. *Bhayaji* 20 *Cr. L. J.* 445 it was observed that in investigating the question of actual possession in a proceeding under Sec. 145 any previous order of a civil or criminal court relating to the property in dispute may throw light upon the matter but the evidentiary value to be attached to any such piece of evidence depends upon the particular circumstances of each case. If one of the parties to the proceeding was in actual possession of the property in dispute and lost that possession by the execution of a decree of the civil court then it lies heavily on him to show that he has since regained possession. But if he was not a party to the civil court decree and if it is not shown that either of the parties to the civil court decree was in actual possession then the former civil proceeding would be of no evidentiary value against him.

In *Anna Sami Aiyanger* v. *Mrethu Kumara Pillai* 12 *Cr. L. J.* 663 it was observed that the Magistrate ought to arrive at his own finding as to which of the parties was in possession under Sec. 145. The decision of the civil court is not conclusive in such proceedings.

In *Atul Chandra Mondol* v. *Srinath Laik* 23 *C. W. N.* 982 it appeared that the first party previously brought a suit for rent against some persons not parties to the proceedings and purchased the disputed property at the sale in execution of an *ex parte* decree obtained therein and was put into possession without the knowledge of the second party and the Magistrate found that the rent suit was not a *bona fide* one brought by the landlord against tenants in possession and declared the second party to be in possession of the disputed land. It was held that in the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside.

The true rule seems to be that a recent decree of the civil court must be followed irrespective of whether the possession delivered in execution of the decree was symbolical or actual. And in case of an old decree the Magistrate should take evidence to decide if possession has been disturbed since the passing of the decree.

In other words when the right to possession has been declared within a time not remote from the Magistrate's taking proceedings under Sec. 145 he should maintain an order which has been passed by a competent court and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders is to assume a jurisdiction which the law does not contemplate. (*Doulat Koer* v. *Ramshani Koiri* 26 *Cal.* 625). This however applies only where there is no doubt whatever as to what the civil court has done that is where it cannot be disputed that a certain party has been declared owner and put in possession by a civil court. When it is fairly open to dispute as to what the decree has decided it is competent to the Magistrate to examine the decree for the purpose of deciding on the evidence the fact of possession at the time if in his opinion the dispute is likely to lead to a breach of the peace, for example, when the dispute is whether the decree related to the land itself or to the limited right to the land itself or to the limited right to levy assessment on it. (*Motilal Hargobind In re* 6 *Bomb. L. R.* 246).

Delivery of symbolical possession by civil court.

See Syed Amber Ali 32 *C. W. N.*

Cases in which symbolical possession only was obtained by the party in whose favour the decree was made, have created considerable difficulty. These have been held to stand on a different footing on the ground that there was no transference of actual possession the maintenance of which is the only object of Sec. 145. In this view it is incumbent on the Magistrate to go into the question of actual possession and consider the evidence produced on that point (*Hazari Khan* 22 *C. W. N.* 479; *Ramlingam Pillai* 1915 *M. W. N.* 554). But where the decree is *interparties* it should not be given the go by merely on the ground that in execution of the decree only symbolical possession was taken. In *Abhoy Mondol* 27 *C. W. N.* 267 *S. C.* 37 *C. L. J.* 256 it has been held that where the decree is *interparties* it is immaterial whether the delivery of possession is symbolical or not. When the dispute is in respect of land of which delivery of pos-

session has been obtained by a decree-holder the judgment debtor should not be allowed to retain possession of the same as against the decree-holder auction purchaser even though it is found that the decree-holder was never in actual possession and the judgment debtor grew crops on the land. (*Atul Hazra* 20 *C. W. N.* 796).

Protap Madainath Sahidco 1923 *Pat.* 76 lays down that the delivery of symbolical possession even erroneously made operates as actual possession against the judgment debtor and his representatives. Possession so delivered under the decree of a civil court takes away the jurisdiction of the Magistrate.

The contrary view has however been taken in subsequent cases. In *Promoda Sundari Dassi* v. *Khetro Bag* 25 *Cr. L. J.* 1104, it has been held that a decree passed *exparte* under which only symbolical possession was delivered is not binding on a criminal court in proceedings under Sec. 145.

In *Shahabaj Mondol* 49 *Cal.*, 177 *S. C.* 25 *C. W. N.* 743, where notwithstanding formal delivery of possession to the decree-holder auction-purchaser in the lifetime of the judgment debtor it was found that ever since the death of the judgment debtor his legal representatives had been in actual possession an order, it was held, could not be made in favour of the auction purchaser. The possession of the heirs was adverse to that of the auction purchaser and was fit to be upheld. This case is also an authority for the proposition that dispossession after delivery of possession has the effect of making the person actually in possession entitled to be declared to be in possession. An auction purchaser in court sale to whom delivery of certificates has been granted but who has not been placed either actually or symbolically in possession cannot be declared to be in possession (*Raghaba Aiyangar* v. *Krishna Sami Aiyar* 31 *Mad.* 614).

It is a settled rule of law that no decree for foreclosure could be effective against a person interested in the property if he was not made a party to the suit. When therefore S had executed in 1890 a mortgage by conditional sale in favour of G and had in 1893 leased the properties covered by it to B for 25 years and G in 1892 instituted a suit against S upon the mort-

gage without making B a party and obtained symbolical possession in execution of a decree for foreclosure passed therein, it was held that such delivery of possession could not affect the possession of B. (*Bloomfield* v. *Gangadhar Kundu* 4 *C. L. J.* 562.)

The proper course for a Magistrate to follow when there has been an adjudication by the civil court is to require security to keep the peace if the defeated party does any act that may probably occasion a breach of the peace. (*Govindo Chandro Moitro* 6 *Cal.* 835; *Amriteswari Devi* 7 *C. W. N.* 558).

(*b*) *Previous adjudication by the criminal court.*

Where an order has already been made under the section in favour of one of the parties to a dispute and no civil suit has been instituted to contest the order and that party's possession is again disturbed by a person claiming under the other party the Magistrate has no jurisdiction to initiate fresh proceedings or to attach the property as the effect of doing so will be to nullify the previous order (*Arun Sardar* 27 *C. W. N.* 171 *S. C.* 37 *C. L. J.* 39; *Bejit Lal Pathak* 1 *Pat. L. Times* 557; *Mohant Krishnalal Gir* 1 *Pat. L. W.* 642) unless it is shown that the order has been duly vacated or possession has been amicably surrendered. (*Bajitlal Pathak ibid, Mohant Krishnalal Giri ibid*).

But if an order under Sec. 145 is made in respect of a larger area which includes the smaller area covered under the previous proceedings which was not challenged by a civil suit the order will be set aside regarding the common area but will stand good regarding the lands not covered by the previous adjudication. (*Bajitlall Pathak ibid*).

A Magistrate's order under Sec. 145 would probably be also subject to one passed by a criminal court under Sec. 522 of the Code on conviction of a person of an offence by which dispossession has been caused by criminal force. (*Prinsep's Commentary* 14 *Ed.*).

But the Magistrate is not bound to accept a finding as to possession which was arrived at in a previous rioting case (*Bulari Raut* 24 *Cr. L. J.* 951) nor is an infructuous order under

Sec. 522 which was never carried into effect a bar to a proceeding under Sec. 145 (*Prokhat Chandra Chatterji* 18 *C. W. N.* 1088) nor is the jurisdiction of the Magistrate ousted by the fact that one of the parties had been previously bound down under Sec. 107. (*Baisnab Charan Mukerji* 39 *Cal.* 469 *S. C.* 16 *C. W. N.* 384).

What is the effect of an order under Sec. 144 Cr. P. C. subsisting up to the time when preceedings under Sec. 145 are started. The enquiry must be limited to possession before the order under Sec. 144 was made. (*Jayanti Kumar Mukherji* 27 *Cal.* 785 *S. C.* 4 *C. W. N.* 562).

(20) Pendency of a civil suit, effect of.

The pendency of a civil suit under Sec. 9 of the Specific Relief Act with regard to certain land in dispute does not oust the Magistrate's jurisdiction to take proceedings under Sec. 145 in respect of the same land (*Kishorilal Roy* v. *Srinath Roy* 36 *Cal.* 370). But in *Amriteswari Debi* v. *Darpa Narain Das* 7 *C. W. N.* 558 it had been held that where one of the parties by bringing a civil suit for recovery of possession has admitted that the other party is in possession there is no question as to possession for the Magistrate to decide in a proceeding under Sec. 145 and he has no jurisdiction to proceed thereunder.

A party who entered into possession more than two months next before the date of the proceeding and retained such possession by virtue of an order under Sec. 144 Cr. P. C. directing his opponent to abstain from entering upon the land in question should be declared to be entitled to possession thereof until evicted in due course of law as the period during which the injunction was in force against his opponent cannot be excluded. (*Srinath Roy* v. *Probhat Chandra Chatterji* 18 *Cr. L. J.* 301).

(21) The final order.

(*a*) *Nature of the order.*

Under sub-section 6 the final order is to be a declaration that the successful party was in actual possession at the date of the proceeding, that

Form of order.

he was entitled to possession until evicted in due course of law and that all disturbance of such possession until such eviction was forbidden (See form No. 22 Schedule V). An order saying that as the court sees that one party is in possession it is not necessary to continue the proceedings is not an order declaring the possession of that party. (*Munidro Ch. Nandi* v. *Baroda Kanto Roy Chowdhury* 6 *C. W. N.* 417).

Evicted in due course of law.

The eviction must be by order of a civil court or of a court acting under statutory authority in which latter case there must be a clear indication in the terms of the statute itself to show that the order has the effect of a decree. (*Mohant Krishna Dayal Gir* 1 *Pat. L. W.* 642).

An entry made in the Record of Rights pursuant to the order of a settlement officer has not the effect of evicting any person. It is only a rebuttable piece of evidence of possession. (*Mohant Krishna Daval Gir ibid.*).

An order under the section does not signify that the successful party is thereby entitled as of right to the property in defiance of whatever legal title there may be existing in favour of the rightful owner. The order only entitles the successful party to possession pending the decree of the civil court.

Finding as to imminence of breach of peace if necessary.

The law does not require the Magistrate to record an express finding in his judgment that a breach of the peace was imminent. It is a matter to be considered in relation to the preliminary order (*Mt. Maqimnnisa* v. *Mt. Ahmedunissa* 2 *Oudh W. N.* 704).

In another Oudh case the view has been taken that in the absence of any finding that there is a likelihood of a breach of the peace an order under Sec. 145 is not justified and the finding that the parties are in a contesting mood is insufficient (*Munnulal* v. *Harde Ram* 28 *Oudh W. N* 220 *S. C.* 26 *Cr L. J.* 944).

Such a finding becomes absolutely necessary when an allegation is made under sub-section 5 that there is no likelihood of a breach of the peace. (See note under sub-section 5.)

(b) Termination of proceedings.

Once proceedings have been started they should be brought to a termination in one or other of the ways contemplated by law. (*Manik* v. *Azimuddi* 6 *C. W. N.* 923).

(c) Postponement Sine Die.

A Magistrate has no power to postpone *sine die* a proceeding under Sec. 145 on the ground that the estate or area in which the land in dispute is, is under settlement by the Revenue authorities under the provisions of Reg. V of 1822. (*Abdul Rauf Mia* v. *Rohomuddin Bhuia* 13 *C. W. N.* 104).

(d) Striking off proceeding.

Striking off proceeding.

The Magistrate has no jurisdiction to strike off the proceedings. He must pass an order either under Sec. 145 or under 146 (*Trilochan Dass* v *Jogeshwar Das* 20 *Cr. L. J.* 464). Proceedings once started can only be terminated by a decision on the evidence as to possession. (*Himmatthian* v. *Emp.* 19 *Cr. L. J.* 712).

But as in *Donepudi Narasiah* v. *Venkiah* 49 *Mad* 232 after proceedings under Sec. 145 are initiated and a preliminary order is passed the Magistrate on becoming satisfied that there is no likelihood of a breach of the peace can drop the proceedings without giving the parties an opportunity to show by evidence that there is a likelihood of a breach of the peace. The existence of Cl. (5) to Sec. 145 does not take away the power of the Magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of a breach of the peace for it only provides for a special case where as the Magistrate is proceeding with the trial of the question of possession the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed.

(e) Effect of an order.

If a party is declared to be entitled to possession and the world at large is forbidden to disturb his possession he would

be entitled to take possession and no one would have any right to interfere with his so doing. (*Bahawala* v. *Duni Chand* 24 *Cr. L. J.* 461).

But it is to be noted that the proposition cannot be comprehensibly laid down that in every case where an order under Sec. 145 Cr. P. C. has been made the necessary consequence is the actual dispossession of the unsuccessful party.

The effect of an order under Sec. 145 in favour of one of the parties is that he on failure by the unsuccessful party to sue to get rid of the order within 3 years under Art. 47 of the Limitation Act acquires a title to the property under Sec. 28 of the Act. (*Dudasika Mani* v. *Muthan Chetty* 15 *I. C.* 24).

(f) Magistrate if may take action by way of execution of the final order.

A Magistrate has no power under the section to place one party in possession by ousting another which he can do under Sec. 522 (*Tulsiram* 13 *A. L. J.*) nor is he competent to dispossess the party found to be in actual possession by appointing a receiver. He is only competent to confirm his possession (*Mewalal* v. *Emp.* 19 *Cr. L. J.* 249).

After passing final order declaring a party to a proceeding under Sec. 145 to be in possession the Magistrate has no jurisdiction to take any proceedings in the nature of execution of the order. Where after the Magistrate in a proceeding under Sec. 145 had declared the first and third parties to be in possession of the property in dispute the police gave formal possession to those parties by planting bamboos but disputes still not ceasing the Magistrate held a local enquiry and again declared the possession of the first and third parties and a further enquiry was held to determine whether the property of which possession had been declared was identical with the subject of the proceeding under Sec. 145 it was held that all the proceedings after the final order passed by the Magistrate in the proceeding under Sec. 145 were *ultra vires*. There is no specific provision in the Code authorising a Magistrate to take proceedings in the

nature of execution after passing orders under Sec. 145. (*Kumar Romendro Narain* v. *Kesharilal Roy* 14 *C. W. N.* 78).

Acting under Sec. 145 it is not open to a Magistrate to remove a superstructure existing on the disputed land. (*Bagha* 14 *Cr. L. J.* 138).

In one case the Magistrate directed that a bund which was in dispute should be removed and that one of the parties should pay to the other party compensation for damages done to crops and it was held that the order was bad. (*Prayag Mathton* 9 *C. W. N.* 862).

In one case the Magistrate directed one of the parties to have an opening in a wall which he was building for the purpose of allowing a tree to be tapped and it was held that the order was without jurisdiction. (*Jiblal Mahton* v. *Emp.* 3 *Pat. L. J.* 316).

In *Mahadi* v. *Beni Prassad* 42 *All.* 214 there was a dispute between parties concerning certain moveable and immoveable properties. The police acting under Sec. 149 locked up the moveables in two rooms in the house. Proceedings under Sec. 145 were taken and the Magistrate came to the conclusion that possession was with the applicant and ordered that the property be made over to her but the two rooms were to remain locked up unless the rights of the parties about the moveables were determined by a civil court It was held that the Magistrate was not competent to pass the order in question.

An order to the effect that if any fruit has been gathered on any of the lands attached by order of the court the proceeds of the sale of such fruits minus expenses shall be handed over to a party is not authorised by Sec. 145 or any other section. (*Arju Mea* v. *Arman Mea* 7 *C. L. J.* 369).

(*g*) *Order on whom binding.*

The parties whom the Magistrate has to deal with are not merely the actual parties to but also all persons who may be concerned in the dispute. Therefore it is not the actual parties but all parties who may have notice of the proceedings that are bound by the order. (*In re Nathu Bhai Briglal* 11 *Bomb. L. R.* 377).

(h) Disobedience of the Magistrate's order.

It would be punishable under Sec. 188 of the Penal Code. In *Goluck Chandra Pal* v. *Kali Chandra De* 13 *Cal.* 175 a person purchasing from the unsuccessful party to the proceeding under the section with knowledge of the Magistrate's order was held to be guilty of disobedience thereof by disturbing the possession of the party in which favour it had been passed.

Section 145 does not empower the court to make any order for laying down boundary marks and the removal of such boundary marks is not offence under Sec. 434 I. P. C. (*Emp.* v. *Rameshwar* 27 *All.* 300 *S. C.* 1 *A. L. J.* 619).

(i) Orders beyond the scope of the section.

An order in favour of several persons some of whom claim no interest in the disputed property is bad (*Raja Rameshwar Prassad* 6 *C. W. N.* 104) nor can the final order be made in respect of a larger area than is included in the proceeding (*Sukhari Nania* 24 *Cr. L. J.* 309 ; *Uttam Sing* 3 *Pat.* 288) and where in the final order a portion of the disputed property was omitted and the Magistrate's notice being drawn to this omission he made an order in respect of the portion omitted it was held that the order should not have been made without hearing the opposite party. (*Notobar Dutt* 22 *C. W. N.* 552).

In some cases the courts have allowed a certain amount of latitude to the Magistrate in making final orders subject to some kind of reservaion which the circumstances of the case may require. An order upholding one party's possession of a temple and directing him to allow the opposite party to perform puja of an idol therein has been held to be competent. (*Palani Yandi Pandaram* v. *Palanappa Thevan* 17 *Cr. L. J.* 235).

But where the Magistrate found that the disputed land was in the possession of the second party but ordered that two path ways should remain intact and only the remainder of the plots should remain in the possession of the second party it was held that the order was without jurisdiction (*Asit Mohan Ghosh* 17 *C. W. N.* 793). The Bombay High Court has refused to follow this ruling and has held that in proceedings under Sec. 145 of

the Code it is competent to the Magistrate not only to award possession of the land in dispute but also to grant a right of way to one of the parties. (*Amar Sing Shevasangji in re* 48 *Bomb.* 512 *S. C.* 26 *Bomb. L. R.* 436).

An order declaring a portion only to be in the possession of one party when entire land is found to be in his possession is bad. (*Asit Mohan Ghosh* 17 *C. W. N.* 793).

(*j*) *Public cannot be declared to be in possession.*

The object of the section is to prevent a breach of the peace in cases of dispute relating to immoveable property. This is to be done by a declaration which party is in possession of the disputed land. It follows therefore that one of the parties must be declared to be in possession if it is possible for the Magistrate to come to a decision. The public cannot be declared to be in possession of any property for if that be done both parties are included and possession is joint and hence the court's jurisdiction is ousted. (*Manik Chandra Chakravarti* 17 *C. W. N.* 205).

(22) Final order how far a judgment.

Whether Sec. 367 of the Code which lays down what a judgment should contain does or does not apply a Magistrate should in the final order sufficiently state the reasons for it so that the High Court in revision may determine whether or not the Magistrate complied with the provisions of Sub-Sec. 4 of Sec. 145 and directed his mind to the consideration of the effect of the evidence adduced before him. (*Bhuban Chandra Hazra* 49 *Cal.* 187 *S. C.* 25 *C. W. N.* 887 34 *Cal. L. J.* 125. *Motaher Ali Jamaddar* v. *Eshaque Sikdar* 39 *C. L. J.* 366).

Apart from Sec. 367 the imperative provision in cl. 4 of Sec. 145 that the Magistrate shall consider the effect of the evidence adduced before him makes it obligatory on the Magistrate to show in the final order that he has done so.

The amending Act of 1923 has now restored the ordinary revisional power of the High Court which it exercises under Secs. 435, 439 of the Code in cases under Sec. 145 of the Code

That being so an order made by a Magistrate under Sec. 145 being now revisable on the ground that it is incorrect or illegal or improper the final order of the Magistrate must conform to the rules governing a judgment of a Criminal Court.

A general remark that the oral evidence is not reliable without referring to it and without giving any reason is not a disposal of the evidence on the record. (*Lachmi Jha* 1921 *Pat.* 110 *S. C.* 222 *Cr. L. J.* 616).

A Magistrate should sign his name in full in a judicial order made under Sec. 145 and should also note his official position. (*Nejem Mirdha* 12 *C. W. N.* 771).

Where after hearing a case under Sec. 145 Cr. P. C. the Magistrate who was under orders of transfer made over charge to another Magistrate who subsequently passed the final order it was held that the Magistrate was *functus officio* and acted without jurisdiction. (*Jagat Bandu* 38 *C. L. J.* 201).

As to admissibility of order as evidence in civil case see 29 *Cal.* 187.

Disobedience of order.

Such disobedience is punishable under Sec. 188 I. P. C.

A person who though not a party to the proceeding is aware of the fact of the order having been made may be guilty of disobedience if he does anything to disturb the possession declared by the Magistrate. (*Goluk Ch. Pal.* v. *Kali Charan De* 13 *Cal.* 175).

An order (Sub-Sec. 6 of Sec. 145) forbidding disturbance of possession found by the Magistrate is an injunction against the whole world.

(24) Attachment of subject of dispute pending enquiry Sub-Sec. 4.

When exercising this power the Magistrate may sometimes be confronted with a difficulty regarding the disposal of moveables found on the property attached.

Disposal of moveables.

In *Kochuny* 1912 *M. W. N.* 540 an elephant was found in a forest which was attached and it was held that the animal should be made over to the party in whose favour the final order would be made.

An order directing that some rooms were to remain locked up but the moveables therein were to be made over to one party has been held to be bad. (*Mahadai* 42 *All.* 214).

In *Ali Muhammad Mandal* v. *Piggot* 32 *Cal. L. J.* 270 (decided by a special Bench) proceedings under Sec. 145 Cr. P. C. were instituted on the ground that a dispute likely to cause a breach of the peace existed between the landlord and the tenants relating to the right to grow and collect lac on plum trees standing on lands comprised in the holdings of the tenants. The District Magistrate attached the disputed trees with lac thereon pending decision. At a later stage by order of the District Magistrate the lac was collected and stored in the godowns of the landlord and a portion thereof was sold by auction. It was held that the Magistrate had no jurisdiction to take action under Sec. 145 or to make the order he had passed. The High Court directed that the lac and the sale proceeds of the portion already sold after deduction of incidental charges should be kept in the custody of the court pending decision by a civil court on the question of title to the lac.

Under Sub-Sec. 8 the legislature has now expressly given the power to Magistrates to make an order pending the enquiry for the proper custody or sale of crop or other produce subject to speedy and natural decay and on the completion of the enquiry to pass necessary orders for the disposal thereof or their sale proceeds.

Division of crops between parties.

It was held in *Ram Narain Sahu* v. *Kailash Sing* 8 *C. L. J.* 242 that the Magistrate could not order a division of the crops on the land in dispute between the parties. It is doubtful if this can now be done even under Sub-Sec. 8.

Harvested crops.

Crops harvested and rents received since the beginning of the dispute may be attached. (*Srinivasa Pillai* v. *Satta Yappa Pillai* 13 *Cr. L. J.* 295).

Cattle in *Muth* attached.

Where a village and a *Muth* situated therein were attached and the Magistrate directed the police officer to take charge of the attached property including some cattle that were found by him in the *Muth* at

the time of attachment and eventually the village and the *Muth* were attached under Sec. 146 it was held that the attachment of the cattle was not illegal. (*Mahant Bharat Das* v. *Ram Charitar Das* 1 *Pat. L. J.* 356 *S. C.* 18 *Cr. L. J.* 287).

Limitation how runs during attachment.

An important question to be considered in this connection is with reference to the law of limitation. Whose possession in the eye of law is to be presumed to continue during the period of attachment? This question has very often been considered with reference to an attachment under Sec. 146 of the Code. In *Abinash Chandra Chowdhury* v. *Tarini Ch. Chowdhury* 30 *C. W. N.* 541 the matter has been exhaustively dealt with. In the case in question there was a *common manager* of the disputed property in whose favour the Magistrate made his final order and it has been held that during the period of attachment the common manager should be taken to be in possession. The distinction is drawn between an attachment under this Sub-Section and that under Sec. 146 and it is observed:—The purposes of the two attachments one under the proviso to cl. (1) (4) of Sec. 145 and the other under Sec. 146 are different and the stakes are not the same * * * Proceedings under Chap. XII of the Criminal Procedure Code are of a *quasi* civil character and the Magistrate intervenes and attaches the property much on the same lines and with a similar purpose as when a receiver is appointed by the court in a civil action in order to prevent a scramble and to preserve the property until the rights of the parties are ascertained. The possession of a receiver appointed under such circumstances is exclusively the possession of the court, the property being regarded as in the custody of the law for the benefit of whoever may be ultimately determined to be entitled thereto. The object of proceedings under Sec. 145 Cr. P. C. being to determine which party was in possession at the date of the proceeding and to declare such party to be entitled to retain possession, the possession of the court during attachment in the course of these proceedings should enure to the benefit of such party in whose favour such a declaration is made. The object of an attachment under

Sec. 146 is to hold the property in anticipation of an action in which the right or title to possession is to be declared by a competent court and the possession of the court during such attachment should enure to the benefit of the party or person in whose favour a competent court would make such a declaration.

Appointment of receiver.

The appointment of a receiver is not prohibited but he has not and cannot exercise all the functions of a receiver appointed under Sec. 146. A receiver appointed under the former section must be treated only as an agent or servant of the Magistrate whose order is only an administrative order passed for the management of the property. (*Srinivasa Pillai* v. *Sathayappa Pillai* 13 Cr. L. J. 295).

The possession of a receiver from the date of his appointment in the case is the possession of the party who is ultimately found to have been in possession prior to the receiver's appointment. (*Ismail Ghami* v. *Kalma Rowther* 22 *M. L. J.* 154.

(25) Stay of proceedings sub-Sec. 5.

The parties served with the initial order or any other person interested may appear before the Magistrate and show that no such dispute as is mentioned in the initial order exists or has existed. In such a case the Magistrate is bound to cancel the initial order because the existence of a dispute likely to cause a breach of the peace is the basis of the Magistrate's jurisdiction.

The effect of Sub-Secs. 4 and 5 read together is that the Magistrate is to consider the written statements put in by the parties as also those put in by any other interested person if any and hear the parties and also any other interested person if any and if there is no case for staying proceedings under Sub-Sec. 5 he is to proceed to receive evidence.

A tenant on a part of the property in dispute is an interested person and should be allowed an opportunity to show that there is no dispute. (In the matter of the petition of *Haran Mandal* 37 *Cal.* 285 *S. C.* 14 *C. W. N.* 708 *S. C.* 11 *C. L. J.* 414).

Sub-Sec. 5 gives the parties or any other interested person a right to show that there is no dispute. The parties called upon to file written statements may aver that there is no dispute regarding the property in question, any other interested person may also put in a written statement making the same averment and it follows that each of them may adduce evidence directed to show the absence of dispute and if after perusing the written statements and considering the evidence adduced for the purpose of Sub-Sec. 5 the Magistrate is still of opinion that there is really a dispute as stated in the initial order he is to receive the evidence adduced by the parties for the purpose of showing actual possession.

Who can show non-existence of dispute.

What is the point of time when the right conferred by Sub-Sec. 5 can be exercised? A plain reading of the section makes it clear that Sub-Sec. (5) applies at any stage of the case after the service of the initial order. The collocation of words, "no such dispute exists or has existed," "subject to such cancellation the order of the Magistrate Sub-Sec. 1 shall be final," shows this. The Sub-Section contemplates the appearance of some one, whether a person actually made a party to the proceeding or some one interested whether served with notice or not and the showing by him that the dispute did not exist originally or no longer existed. In other words the Sub-section provides for a special case, where, as the Magistrate is proceeding with the trial of the question of possession the parties to the proceeding or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or existed. (*Donapudi Nara Sayya* v. *Chinguluri* 49 *Mad.* 232).

Stage when Sub-Sec. 5 can be applied.

The existence of this clause does not take away the power of the Magistrate himself to drop the proceedings if he is satisfied that there is no further likelihood of a breach of the peace (*Donapudi Nara Sayya*), *i.e.*, before any party or interested person appears and after the initial order is drawn up. But as pointed out before (see note under the heading "Initial order") how is he to be satisfied as to the non-existence of a dispute likely to cause a breach of the peace unless some one

points that out to him and bearing in mind that the proceeding is to be tried judicially what possible material can there be forthcoming to justify the Magistrate to drop the proceedings? The only thing that can be conceived is a police report that proceedings are no longer necessary.

Thus where the parties have entered into evidence under Sub-Sec. (4) it is open to them as also to any other interested person to show that the dispute alleged no longer exists and whenever this is shown the proceedings are to be stayed.

Effect of Sub-Sec. 5 on final order.

The effect of Sub-Sec. 5 is therefore to make it imperative that the Magistrate should record a finding in the final order as to the existence of a breach of the peace whenever the non-existence thereof has been alleged in the written statement filed by any of the parties or any other interested person or in the course of the evidence adduced by the parties or any other interested person. Omission to record such a finding in the cases aforesaid will vitiate the final order.

In *Ranada Ranjan Bhattacharya* 25 *C. W. N.* 215 the effect of Sub-Sec. 5 has however been held to be that unless a party is in a position to show to the Magistrate that there is no likelihood of a breach of the peace the Magistrate's order under Sub-Sec. (1) stands. The mere absence of a finding of the Magistrate that there is likelihood of a breach of the peace where there are mere allegations by the parties to the contrary does not go to the root of the Magistrate's jurisdiction.

Parties and interested persons.

Parties can adduce evidence to show absence of dispute and actual possession whereas the right of any other interested person is limited only to the first point. The significance of Sub-Sec. 5 is far-reaching and it is very often overlooked that Sub-Sec. 5 controls Sub-Sec. 4.

Principle in Sub-Sec. 5.

The apprehension of a breach of the peace is the first condition necessary to give the Magistrate jurisdiction under Sec. 145 and if it is found that there is no longer any such apprehension the Magistrate's jurisdiction ceases. The Magistrate is then bound to cancel the

initial order and stay all further proceedings under cl. (5). (*Muhammad Khandu* v. *Sadak Ali* 38 *C. L. J.* 284).

Evidence if must be taken before dropping proceedings.

It is not obligatory for a Magistrate to take evidence before dropping proceedings under Sec. 145 if he is otherwise satisfied (*e.g.* on the petition of a third party) that no dispute likely to cause a breach of the peace existed. (*Gothi Pathi Surya Narayana* 47 *Mad.* 713).

Magistrate's jurisdiction to stay proceedings at any stage.

A Magistrate has at any stage of an enquiry under Sec. 145 full jurisdiction to drop proceedings on being satisfied that there is no apprehension of a breach of the peace. (*Kamuluammal v. Vavu Rowther* 17 *Cr. L. J.* 138).

Magistrates must act judicially.

But the Magistrate must act judicially on facts properly placed before him which are sufficient to satisfy him that no dispute likely to cause a breach of the peace existed. He would not be justified in acting on a letter addressed to him by one party admitting the other party's possession. (*Tara Charan Sarkar* v. *Bengal Coal Co.* 13 *C. W. N.* 125).

An order made as to possession in favour of one party or the other in circumstances showing the absence of the likelihood of a breach of the peace is beyond the scope of the section.

Order under Sub-Sec. 6 in proper case under Sub-Sec. 5.

Where a proceeding was drawn up between two parties and thereafter a third party was added who claimed the disputed property but asserted that there was no longer any likelihood of a breach of the peace but the Magistrate made his final order in favour of the third party it was held that the order was without jurisdiction and the Magistrate should have proceeded under Cl. (5). (*Rasik Lal Hore* 25 *C. W. N.* 214).

Arbitration if good ground for staying proceedings.

If the parties have privately referred the dispute to arbitration and the award of the arbitrators has been accepted by both the Magistrate would have ground for proceeding under Sub-Sec. 5 (*Jamuna Das Kijriwalla* 25 *C. W. N.* 719 *S. C.* 33 *C. L. J.* 338).

Revival of proceeding cancelled.

Once proceedings are cancelled on the ground that there is no likelihood of a breach of the peace they cannot be revived on the same materials. (*Deonandan* 2 *Pat. L. W.* 26 . *Ghulam Muhammad* 3 *Lahore* 401).

When on a reference to arbitration the Magistrate stayed further proceedings and subsequently on the failure of the arbitration revived the proceeding about two years later it was held that the stay order was in terms one under Sub-Sec. 5 and directly it was passed the Magistrate ceased to have jurisdiction. (*Kalanond Sing* 15 *C. W. N.* 271).

An order on a petition of compromise that the lands are to be in the possession of both sides as stated in the petition is an order under cl. 5 and a subsequent proceeding between the parties in respect of the same lands is not one without jurisdiction. (*Sadhu Biswas* 15 *C. W. N.* 568).

(26) Custody and sale of crops, etc.—Sub-Sec. 8.

There was some divergence of opinion as to disposal of crops and such other produce and it was held that where the Magistrate being of opinion that there was no likelihood of a breach of the peace decides to drop the proceedings under Sec. 145 he has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other (*Kari Muddi Pakir* v. *Nai Muddi Kavirij* 3 *C. L. J.* 573), to order that the sale proceeds of crops which he had attached should be kept in deposit in court till a civil court should adjudicate on the rights of the parties. (*Gothi Pathi* 47 *Mad.* 713).

Reported cases show that difficulty sometimes arose about crops and other produce of land subject to speedy and natural decay which were on the property in dispute although the Magistrate had always the power to make an *ad interim* attachment in a case of emergency. This sub-section now clothes the Magistrate with the fullest authority to make such order as he thinks proper for the proper custody or sale of such produce pending the enquiry and on completion of the enquiry to make the necessary order for the disposal of the property or the

sale proceeds. *The question should be considered whether an order under Sub-Sec. 5 staying proceeding is a completion of the enquiry.*

This sub-section however is an instance of bad drafting and the words used are likely to lead to a confusion.

This sub-section (8) deals with "crop or other produce of the property the subject of dispute" and it says that "if the Magistrate is of opinion that such crop or other produce of the property the subject of dispute is subject to speedy and natural decay he may make an order for the proper custody or sale of such property and upon the completion of the enquiry shall make such order for the disposal of such property or the sale proceeds thereof as he thinks fit."

Now such property must mean crop or other produce of the property the subject of dispute and not the property in dispute but the words as they are may be construed to mean that the Magistrate is competent to make an order for the proper custody or sale of the property itself the crop or other produce of which is subject to speedy and natural decay. That this is not the intention of the legislature is quite clear but the words used are not happily chosen.

"Custody or sale of such crop or other produce" instead of "such property" will place the matter beyond any controversy.

(27) Death of a party and substitution of legal representative.

Sub-Sec. 7 as it stood before the amendement laid down that "proceedings under the section shall not abate by reason only of the death of any of the parties thereto." There was no provision for substituting the legal representatives of a deceased party. That provision has now been made.

(28) Saving of powers of Magistrates to take bonds for keeping the peace.

Before the amendment it was contended in many cases that in cases of land disputes coming within the purview of

Sec. 145 proceedings under Sec. 107 were inappropriate and judicial opinion was not unanimous on the subject.

In *Balajit Sing* v. *Bhoju Ghosh* 35 *Cal.* 117 ; *Delegobindo Chowdhury* v. *Dhanukhan* 25 *Cal.* 559 ; *Sheobalak Sing* v. *Kamaruddin* 1922 *Pat.* 241 the application of Sec. 107 to cases of land dispute was condemned. The opposite view was taken in *Sheoraj Roy* v. *Chattu Roy* 32 *Cal.* 996 *and King Emp.* v. *Basiuddin Mollah* 7 *C. W. N.* 746. The present Sub-Sec. 10 has been enacted evidently to set at rest this conflict of decisions and it has been laid down that nothing in Sec. 145 shall be deemed to be in derogation of the powers of the Magistrate to proceed under Sec. 107. Even after the introduction of this sub-section it has been held by the Patna High Court *Shama Charan* v. *King Emp.* 1925, *Patna* 265 that the principle is clear that the provisions of Sec. 145 are mandatory and while it is discretionary with the Magistrate to draw up proceedings under Sec. 107 Cr. P. C. the proper course where there is a *bona fide* dispute as to lands is to proceed under Sec. 145 otherwise the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties is in possession.

(29) Review of order made under the section.

Under Sec. 369 no court when it has signed its judgment shall alter or review the same except to correct a clerical error. This may be taken to apply to an order made under Sec. 145.

In *Natabar Dutt* v. *Bireshwar Rakhit* 22 *C. W. N.* 552 proceedings under Sec. 145 Cr. P. C. were drawn up in respect of certain premises consisting of a Dalan, a hotel and a privy and the Magistrate made his final order with regard to the first two and subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party's possession of it without any notice to the other party. It was held that the order should not have been made without hearing the other party.

(30) Revision of orders under the section.

In the Code of 1882 order under Secs. 143, 144 and proceedings under Sec 176 were excluded from the ordinary revisional jurisdiction under Secs. 435, 439. In the Code of 1898 proceedings under Chap. XII were also excluded but by the amending Act of 1923 Sub-Sec. 3 of Sec. 435 has been repealed and the effect of it is that all these orders can now be revised under Sec. 439 of the Code.

After the Code of 1898 was passed the question arose as to how orders under Sec. 145 of the Code could be interfered with by the High Court and it was settled that the only law permitting such interference was Sec. 15 of the Charter Act corresponding to Sec. 107 of the Government of India Act. It followed in consequence that these orders could only be revised on limited grounds, *viz.*, on the ground of want of or material irregularity in the exercise of jurisdiction.

The courts which were not chartered High Courts had not this power to revise orders under Sec. 145. But gradually such courts also began to revise orders made without jurisdiction and this used to be done under Sec. 439 and in *Udai Bhan Pratab Sing* v. *Ram Samh* 18 *Cr. L. J.* 100 *S. C.* 19 *Oudh Cases* 136 it was laid down that there was nothing in Sec. 435 (3) Cr. P. C. to prevent the court of the Judicial Commissioner from interfering in proceedings which purported to be proceedings under Ch. XII in a case where the Magistrate had initiated the proceedings without jurisdiction. The tendency of judicial decisions especially in the Calcutta High Court was to widen the scope of the special power of interference under the Charter. In *Ali Muhammad Mandal* v. *Piggot* 32 *C. L. J.* 270 a special Bench of the Calcutta High Court held that the High Court had inherent power to give directions as to the disposal of property which was attached and was dealt with by a subordinate court in the course of proceedings instituted without jurisdiction under Sec. 145.

Instances were not wanting when the opposite view was carried to ridiculous extremes as for example the decision of

the Allahabad High Court that there might be the power to revise under the Charter but there was absolutely no power to call for the records.

The prolonged tussle between the opinion on one side that the power of revision under the Charter (or the Government of India Act) was very limited and that on the other that in exercise of those powers the arm of the High Court was long enough to reach any kind of wrong perpetrated by the lower courts has been set at rest by the restoration to the High Court the power which had been curtailed.

In cases of difference of opinion in the High Court in matters coming under Sec. 145 the Senior Judge's opinion was held to prevail (the *Indian Iron and Steel Company* v. *Banso Gopal Tewari* 32 *C. L. J.* 54 ; *Mariam Bewa* v. *Meajan Sirdar* 47 *Cal.* 438 *S. C.* 24 *C. W. N.* 97) inasmuch as the jurisdiction exercised by the High Court was under Sec. 107 of the Government of India Act but now in case of such difference the matter will have to be referred to a third Judge under Sec. 429 read with Sec. 439.

The High Court has no jurisdiction to entertain a petition for the appointment of a receiver pending the disposal of a criminal revision petition preferred against an order of the lower court passed under Sec. 145. (*Maru Dayya Thevar* v. *Shanmuga Sundara Thevar* 49 *M. L. J.* 593).

In *Pran Ballav Mittra* v. *Rash Behari Mittra* 4 *C. L. J.* 418 during the pendency of a Rule issued by the High Court against an order purporting to have been made under Sec. 145 another proceeding was drawn up and the action of the Magistrate was condemned as not only irregular but highly improper.

A District Magistrate has no jurisdiction to revise the order of a subordinate Magistrate striking off a case under Sec. 145 but where such Magistrate declined to take proceedings and the District Magistrate acting on the same police report instituted proceedings under Sec. 145 it was held that the order of the District Magistrate was within his jurisdiction. (*Baidya Nath Majumdar* v. *Nibaran Chandra Ghosh* 6 *C. W. N.* 290).

The High Court can award costs of a revision petition against an order under Sec. 145 Cr. P. C. (*Bai Jiba* v. *Chandulal Ambulal* 27 *Bomb. L. R.* 1353).

(See further note on the subject under Sec. 148).

(31) Quashing of proceedings.

Under its limited jurisdiction the High Court does not ordinarily interfere with a preliminary order under Sec. 145 except where such order is manifestly liable to be set aside.

In *Radha Raman Ghosh* v. *Baliram Ram* 32 *Cal.* 249 *S. C.* 8 *C. W. N.* 885 proceedings started in respect of a colliery which was a partnership business were quashed by the High Court.

(32) Institution of proceedings if may be ordered by superior court.

As it is essential that the Magistrate himself must be satisfied as to the existence of the dispute likely to cause a breach of the peace a District Magistrate cannot direct a subordinate Magistrate to institute a proceeding under the section (*Kailash Chandra Pal* 24 *Cal.* 391 ; *Baidya Nath Majumdar* 6 *C. W. N.* 290 ; *Rashbehary Sing* 1 *Pat. L. W.* 258) nor is it in any way competent for the Sessions Judge to make any such order (*Q. E.* v. *Govindo Chandra Das* 20 *Cal.* 520) nor can such order be made by the High Court. (*In re Ekram Sing* 3 *C. W. N.* 297 *Manindro Ch. Nandi* v. *Baroda Kanto Roy* 6 *C. W. N.* 417).

Proceedings started by one Magistrate if can be continued by successor in office.

Proceedings under Sec. 145 are enquiries within the meaning of the Code of Criminal Procedure. Under the Code enquiry means not only an enquiry into an offence but extends to enquiry into matters which are not offences. When in the course of a proceeding under Sec. 145 one Magistrate is transferred and another comes in his place the latter if of competent jurisdiction can deal with the proceeding under Sec. 350 which ought to be construed with all reasonable

liberality. (*Ali Mahommad Khan* v. *Tarak Chandra Banerji* 13 *C. W. N.* 420).

(33) Transfer of case under Sec. 145 Cr. P. C.

Under Sec. 526 whenever any of the grounds covered by clauses (*a*), (*b*), (*d*) and (*e*) exists the High Court may direct the transfer of a case under Sec. 145 from one court to another.

The section as it now stands after the amendment is free from ambiguity. Formerly a difference of opinion arose on account of the expression "any criminal case" in Sub-Sec. (ii) Sec. 526 which has now been replaced by any "particular case."

Previous to the amendment the Calcutta High Court held in *Lalit Mohan Moitra* 28 *Cal.* 709 *S. C.* 5 *C. W. N.* 749 that the High Court had power to make a transfer. In this case Ghosh J. was of opinion that there was the power both under the Charter Act and under Sec. 526 while Taylor J. was of opinion that it was only under the Letters Patent.

The Bombay High Court took the contrary view in *In re Pandurang Govind Pujari* 25 *Bomb.* 179 It was held that a criminal case means a case arising out of and dealing with some crime already committed and does not include proceedings taken for the prevention of crime. That being so the provisions of Sec. 526 do not give any power to direct the transfer of any proceedings instituted under Sec. 145. In this case the powers under the Charter Act were not considered.

In *Anumuga Tigundan* 26 *Mad.* 188 the Madras High Court held that "a case under Sec. 145 is a Criminal Case and the High Court has jurisdiction to transfer it both under Sec. 526 and the Letters Patent of the Court."

As stated above the controversy has now been set at rest by the legislature.

The District Magistrate may transfer a case under Chap. XII to a Magistrate of the first class subordinate to him. (*Satish Chandra Pandey* v. *Rajendro Narain Bagchi* 22 *Cal.* 808 ; *Ramkishore Roy* v. *Dwarkanath Sen* 10 *C. W. N.* 1095).

Is a party to a proceeding under Sec. 145 entitled to adjournment under Sub-sec. 8 of Sec. 526? In *Lakhan Chandra*

Roy v. *Fakub Mondol* 18 *C. W. N.* 393 it was held he is not and cl. 8 does not apply to proceedings under Chap. XII.

Similar to the change made in Sub-Sec. 1 (*ii*) an alternation has been made in Sub-Sec. (8) which now runs thus—"If in the course of any inquiry or trial or before the commencement of the hearing of an appeal, etc." whereas it formerly stood as follows "If in any Criminal Case or appeal before the commencement of the hearing, etc."

Does the alteration have the effect of entitling a party to a proceeding under Sec. 145 to an adjournment under Sub-Sec. (8)? The difficulty seems to be that such a party cannot come within the description the complainant or the accused.

(34) Civil suit by party unsuccessful in a proceeding under Sec. 145.

Art. 47 of the Limitation Act is applicable to a suit for possession of land in respect of which an order has been passed under Sec, 145 even though the Magistrate acted illegally and with irregularity in not making proper enquiries though the notice is not served in due course of law. (*Parasuramayya* v. *Rama Chandradu* 38 *Mad.* 432)

A party who was unsuccessful in the proceeding under Sec. 145 cannot by forcibly ejecting the other side and getting back possession unlawfully enlarge the period of limitation for the suit which he must bring to recover possession to get over the order under Sec. 145 if he is dispossessed. (*Ram Sahai* v. *Benode Behary Ghosh* 21 *A. L. J.* 102).

As to pleader who appeared for a party in a proceeding under Sec. 145 appearing for the opposite party in subsequent civil suit arising out of the same proceeding see *Srinivasa Rau* 38 *Mad.* 650.

(35) Change of Magistrate.

The successor in office of a Magistrate if of competent jurisdiction, can go on with the proceeding (*Ali Mahomed* 13 *C. W. N.* 420).

CHAPTER XXXIII.

DISPUTE RELATING TO IMMOVEABLE PROPERTY CONTINUED, ATTACHMENT OF SUBJECT OF DISPUTE.

Power to attach subject of dispute.

146. (*1*) If the Magistrate decides that none of the parties was then in such possession or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof :

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(*2*) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, *and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court,* appoint a receiver thereof, who subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure :

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged.

The Magistrate is authorised to attach the disputed property in two cases only, *viz.*, (1) when he finds that none of the parties is in possession at the date of the proceeding (2) when he is unable to decide who is in possession.

The possession of the Magistrate is the possession of the rightful owner.

After making the order of attachment the Magistrate may appoint a receiver of the disputed property who shall have all the powers of a receiver appointed by the civil court.

If subsequent to the appointment of a receiver by the Magistrate another receiver is appointed by the civil court possession of the property will be made over to him by the former receiver.

By the amending Act of 1923 changes have been introduced into the section (146) so as to authorise the Magistrate to cancel the attachment at any time on being satisfied that likelihood of a breach of the peace no longer exists. The same power is also given to the District Magistrate. The position of the receiver appointed by the Magistrate in relation to another receiver appointed by the civil court is also made clear.

A necessary preliminary to an order of attachment is that proceedings should have been taken under Sec. 145. (*Azizuddin* v. *Emp.* 2 *A. L. J.* 149).

The Magistrate must make an honest effort to decide which party is in possession. He should therefore grant a reasonable adjournment to the parties to present their case before him. (*Maura Khan Sing In re Pat. L. W.* 55 *S. C.* 18 *Cr. L. J.* 413).

A Magistrate has no jurisdiction to pass an order of attachment behind the back of the parties or *ex parte*. (*Luchmi Sing* v *Bhuri Sing* 19 *Cr. L. J.* 225).

Where the parties appeared on the day of hearing and did not file any written statement or produce any evidence but prayed for time which the Magistrate did not grant and he proceeded to hear the parties and made an order of attachment it was held that the Magistrate in so doing refused to exercise jurisdiction (*Shaikh Mansur* v. *Ali Motiullah* 12 *C. W. N.* 896).

The power conferred by Sec. 146 can only be exercised when the Magistrate is unable to decide which party is in possession. He cannot take action merely because he cannot decide who is entitled to possession. (*Somnath In re* 6 *Bomb. L. R.* 723 ; *Songan Besawan In re* 7 *Bomb. L. R.* 18).

When the section speaks of the Magistrate being unable to satisfy himself as to which of the parties was in actual possession it contemplates that the Magistrate has considered the evidence fairly and judicially for the purpose of arriving at a decision. (*Ambica Nath Rof* v. *Wajid Ali Khan* 23 *C. W. N.* 910 *S. C.* 29 *C. L. J.* 459).

He cannot merely say that he is unable to satisfy himself if he had never made the slightest effort. (*Sheobolak Rai* v. *Bhagwat Pandey* 16 *C. W. N.* 1052 *S. C.* 40 *Cal.* 105).

The Magistrate is bound to find possession in accordance with the decree of a civil court and an order of attachment inspite of such a decree is bad. (*Gulraj Marwari* v. *Sheikh Baboo* 32 *Cal.* 796).

Determination of the rights of the parties by a competent court puts an end to the attachment and an order of the revenue court in favour of one party's right to possession may be taken to be such a determination. (*Ramasri* v. *Sri Kishen* 2 *A. L. J.* 803 ; *Surendro Bikram Sing* v. *Kimp Emp.* 25 *Oudh Cases* 242).

An order by the survey authorities under Sec. 41 of the Bengal Survey Act has the force of a civil court decree and is therefore tantamount to an order passed by a competent court as provided for in Chap. XII of the Code. (*C. J. Ambler* v. *Shah Somi Ahmed* 37 *Cal.* 331 *S. C.* 11 *C. L. J.* 417 ; *Profulla Nath Tagore* v. *Hudding* 21 *C. W. N.* 1059 *S. C.* 26 *C. L. J.* 39).

An entry in the Record of Rights is not such an adjudication of the rights of the parties. (*Kutiswar Mondal* v. *Jitendro Nath Sen* 26 *Cr. L. J.* 1055).

It is not necessary that there should be a decree in favour of all the parties to enable the Magistrate to withdraw an attachment and if there is an adjudication by a civil court in favour of some at least of the parties that is sufficient for the

purpose to walk out of the property. (*Vetheba Rao* v. *Narasinga Rao* 20 *M. L. T.* 247 *S. C.* 17 *Cr. L. J.* 33 ; *Ases Kumar Misra* v. *Kishore Mohan Sarkar* 39 *C. L. J.* 353).

Where each party is found to be in possession of different portions of the disputed land no order of an attachment under Sec. 146 can be made. (*Rajendro Narain Roy* v. *Mahomed Arzudand Khan* 9 *C. W. N.* 887 *S. C.* 1 *C. L. J.* 331).

It is apparent that no order of attachment can be made when the parties are found to be in joint possession. (*Mohammed Koolayappa Rowthan* v. *Shikh Abdul Khadir Rowthan* 27 *M. L. J.* 169).

It should be held as a very important principle in cases under Sec. 145 that a Magistrate should be extremely reluctant to attach the property in dispute.

Where the land is admittedly subject year by year and season by season to cultivation it is his duty to collect and sift the evidence and come to a conclusion as regards possession. (*Ram Bahal Sing* v. *Rai Bahadur Sing.* 1924 *Pat.* 804 *S. C.* 25 *Cr. L. J.* 1295 ; *Koolayappa Routhan* v. *Shikh Abdul Khadir Rowthan* 27 *M. L. J.* 169).

An attachment implies the taking and keeping possession of the attached property by the Magistrate ; in other words, the property attached passes into legal custody for the benefit of the true owner (*Brajendro Kishore* v. *Abdul Razac* 20 *C. W. N.* 481 *S. C.* 22 *C. L. J.* 283).

The adverse possession of a person in wrongful possession is interrupted thereby and the possession of the rightful owner is thereby revived in the eye of the law. The intervention of the public authorities for the preservation of the peace operates in the same way as the vis major of the floods and the constructive possession of the land is thereafter if anywhere in the true owner. (*Sarat Chandra* v. *Bibhabati Debi* 34 *C. L. J.* 302).

Although an attachment under Sec. 146 interferes with physical possession it does not affect the legal rights of the parties concerned and the property under attachment is held for the

person ultimately shown to be entitled to possession. (*Shyama Charan Roy* v. *Suryo Kanto Acharya* 15 *C. W. N.* 163).

The provisions of Sec. 146 are different from those of Sec. 145(6). An order under Sec. 145(6) entitles the successful party to possession till he is evicted therefrom in due course of law. When there is an attachment under Sec. 146 the plaintiff who comes to court after attachment has to show the court he has rights in the lands and is entitled to possession. (*Hargobind Rai* v. *Krishna Prasad Sing* 1924 *Pat.* 297).

Where after attachment by the Magistrate one of the parties sued the other for possession and damages it was held that the damages for loss of profits were not the probable result of the defendant's act, being the consequence of the order of the Magistrate, and that the defendant was not liable in damages to the plaintiff. (*Mackay* v. *R. H. Cave* 12 *Cr. L. J.* 14).

In *Lokenath Saha* v. *Naidu Biswas* 6 *C. W. N.* 469 the Magistrate attached the property in dispute and in management thereof granted a lease and the District Magistrate cancelled the lease. It was held that the High Court would not interfere when a remedy could be easily obtained from a civil court.

No suit for damages lies for attachment under the section erroneously made by a Magistrate. (*Rani Mina Kumari Bibi* v. *Surendro Narain Chakravarty* 10 *C. L. J.* 226).

CHAPTER XXXIV.

DISPUTE RELATING TO RIGHT OF USER OF IMMOVEABLE PROPERTY.

Disputes concerning rights of use of immoveable property, etc.

147. (1) *Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied, from a police-report or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in S.* 145, *sub-S.* (2) *(whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate, and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in S.* 145 *and the provisions of that section shall as far as may be, be applicable in the case of such inquiry.*

(2) *If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right:*

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry or where the right is exercisable only at particular seasons or on particular

occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.*

History and scope of the section.

This section may, generally speaking be said to deal with disputes concerning right of use of immoveable property. In the Codes of 1861 and 1872 the applicability of the corresponding sections was not dependent on the likelihood of a breach of the peace. That condition was first introduced in the Code of 1882 and has been kept in the subsequent Codes. It is significant that under Sec. 145 on a proper case being made out a Magistrate invested with jurisdiction *shall* take action but under Sec. 147 the Magistrate *may* do so.

Sec. 532 of the Code of 1872 dealt with disputes "concerning the right of use of any land or water or any right of way".

In the Code of 1882 Sec. 147 dealt with disputes "likely to cause a breach of the peace concerning the right to do or prevent the doing of anything in or upon any tangible immoveable property" and if on enquiry the right was found to exist the Magistrate could make an order "permitting such thing to be done or directing that such thing shall not be done".

In the Code of 1898 the section was altered and the dispute was described as one concerning the right of use of any land or water including any right of way or other easement over the same and the Magistrate was authorised in case the right was found to exist, to make an order permitting such thing to be done or directing that such thing shall not be done.

A worse case of bad drafting cannot be imagined and the wonder is that it was allowed to stand for about quarter of a century. Sir Henry Prinsep in his commentary observed——

"The drafting of this section in modification of the previous law is unfortunate for, as it runs, the section is unintelligible. The dispute must be concerning the right of use of any land and water and it must also be one that is likely to cause a breach of the peace and if after an enquiry on the lines of Sec. 145 it appears to the Magistrate that such right exists he may make an order "permitting such thing to be done or directing that such thing shall not be done". But there is no reference to or description of thing which may be done or which may not be done."

By the amending Act of 1923 a newly drafted section has been substituted and the dispute has been described as one likely to cause a breach of the peace "regarding any alleged right or user of any land or water as explained in Sec. 145 Sub-Sec. 2" (*i.e.*, of any land or water including buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property) and the order that the Magistrate is authorised to make is one prohibiting any interference with the exercise of such right if the right is found to exist and prohibiting any exercise of the alleged right where it is non-existent.

In re-drafting the section care has been taken to make it clear that the enquiry is to be conducted exactly in the same manner under Sec. 145. The latter deals with disputes concerning land or water (including buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property) while Sec. 147 deals with those regarding an alleged right of user of the same.

The changes effected are the following:—

(1) "Right of user (including any right of way or other easement)" has now been changed to "Right of user (whether such right be claimed as an easement or otherwise)" (2) "Land or water" has now been changed to "Land or Water as explained in section 145 Sub-Sec. (2)."

Before the amendment it was held that a dispute with regard to the management of a temple and the right to the performance of Puja therein was not a dispute of the kind to which Sec. 147 applied as the words land or water in that section are

used in their ordinary significance without the extended meaning assigned to them in Sec. 145 (2) (*Palaniandi Pandaram* v. *Palanappa Thevan* 17 *Cr. L. J.* 235).

It was held that a privy was neither land or water nor the use of it an easement over the same within the meaning of the section. (In *re Shanker Sadasiva Katre* 15 *Bomb. L. R.* 329).

A right of user of buildings, markets, fisheries is quite intelligible but such a right with reference to crops or other produce of land and the rents or profits of any such property is not easy of conception.

Formerly it was "he (Magistrate) may enquire into the matter in manner provided by Sec. 145".

It was held in *Mellar* v. *Rajendra Nath Chowdhury* 2 *C. W. N.* 670 that Sec. 147 did not require the Magistrate to formally record a proceeding stating the grounds of his being satisfied as to the existence of a dispute likely to cause a breach of the peace.

It has now been enacted that the Magistrate may make an order in writing drawing up the initial order contemplated by cl. (1) of Sec. 145 and having drawn up the initial order "shall thereafter enquire into the matter in the manner provided in Sec. 145 and the provision of that section shall, as far as may be, be applicable in the case of such enquiry."

Now under the present section is the Magistrate bound to draw up an initial order as under Sec. 145 cl. (1)?

The intention of the legislature is quite clear. It wanted to supply the defect pointed out in the case cited above but bad drafting is again responsible for creating confusion though it was the intention of the legislature to make matters clear.

A survey of the history of the section will show that from the earliest Codes throughout a distinction has been observed as between disputes relating to immoveable property and those relating to the right of use of immoveable property.

In the former class of cases the language has been in all the Codes that the Magistrate shall draw up a proceeding stating the particulars mentioned whereas in cases of disputes relating to the right of use of immoveable property it has always been

enacted that the Magistrate may enquire into the matter in the same manner as in the other class of cases.

The legislature wanted to make it obligatory on Magistrates to draw up a proceeding in the manner required by sec. 145 and to hold the enquiry in the same manner, at the same time leaving it to the discretion of the Magistrate to take action under the section or not. In giving effect to its intention the legislature has said that the Magistrate shall enquire into the matter in the manner provided by Sec. 145 but it has tacked on the words employed to indicate the necessity of drawing up an initial order to the old " may " which indicated the discretion of the Magistrate in the matter of taking action under the section and which the legislature wanted to keep intact.

The intention of the legislature was to express that the Magistrate may in his discretion take action under the section but if he chooses to do so he is bound to record an initial order stating the particulars mentioned and to hold the enquiry in the manner provided in Sec. 145.

Formerly the final order that could be made was "permitting such thing to be done or directing that such thing shall not be done as the case may be until the person objecting to such thing being done or claiming that such thing may be done obtains the decision of a competent court adjudging him to be entitled to prevent the doing of or to do such thing as the case may be." Now if it appears to the Magistrate that such right exists he may make an order prohibiting any interference with the exercise of such right and if it appears that such right does not exist he may make an order prohibiting any exercise of the alleged right. It is to be noted that formerly an order under the section was contemplated only in case the right in question was found to exist. Even then it was held that the Magistrate could make a prohibitory order against the party who was found not to have the right which he claimed. (*Pyari Mohan Shaha* v. *Harish Chandra Shaha* 20 *Cr. L. J.* 251).

Before the amendment it was held that where it was found that the first party had a right to the flow of water for purposes of irrigation from a certain channel passing through the village

of the second party who obstructed such flow by erecting such bunds the Magistrate was competent to direct the removal of the obstruction. (*Pashupati Nath Bose* v. *Nando Lal Bose* 5 *C. W. N.* 67 ; *Lalit Ch. Neogy* v. *Tarini Prosad Gupta* 5 *C. W. N.* 335).

Dowlat Koer v. *Siva Pershad* 15 *Cr. L. J.* 267 and *Ambika Prosad Sing* v. *Gursabay Sing* 13 *Cr. L. J.* 184 went so far as to hold that a Magistrate had power to invoke the assistance of the police in carrying out an injunction made by him under the section and to see that an obstruction was removed.

In *Karuppanan Goundau* v. *Kandasami Goundau* 26 *M. L. J.* 233 it was held that orders to remove obstruction to public path ways could be made under the section.

In *Manzur Hussain* v. *Gauri Lal Das* 20 *Cr. L. J.* 209 it was held that if it was found that a right of user of water in favour of any party existed it was competent for a Magistrate either to direct an obstruction to be removed or direct that an obstruction or dam be constructed as the case might be for the purpose of enabling the party to enjoy the use of water declared in his favour.

Whatever might have been the powers of the Magistrate before the amendment the law as it now stands only authorises him to make an order prohibiting any interference with the exercise of or prohibiting the exercise of the right in question and the Magistrate is no more competent under Sec. 147 to direct the removal of an obstruction than to oust a party and make over possession to another under Sec. 145.

The present section does not give the Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction, for example, to direct a party to demolish a wall raised on his own land blocking the windows in the house of the other party and shutting out light and air The power given by the section is analogous to the power of a civil court to grant a temporary injunction. The Magistrate has only the power to issue a prohibitory order restraining any person from doing any act interfering with the right of another (*Hari Moti Dassi* v. *Hari Dassi Dassi* 41 *C. L. J.* 568).

The order of the Magistrate has now been made subject to any subsequent decision of a "civil court of competent jurisdiction" instead of a "competent court."

A "competent court" might be a criminal court as well as a civil court but now the Magistrate's order is subject only to a subsequent decision of a civil court of competent jurisdiction.

The right of use of land contemplated by Sec. 147 has been held to be one of an entirely different description resembling a right of easement, not one arising from the terms of a contract between landlord and tenant. Thus a dispute between a landlord and a tenant regarding the right of the latter to erect or re-erect a *gola* which has fallen down is not a matter properly coming within the section. The settlement of such a dispute involving issues of right can be properly determined by a civil court. (*Emp.* v. *Ganpat Kalwar* 4 *C. W. N.* 779).

Nor can a matter which is not open to adjudication by a civil court be made the subject of a proceeding under Sec. 147. In such a case the proper course for the Magistrate is to bind down the contending parties to keep the peace. (*In re Atmaram Narayan Parab* 14 *Bomb.* 25). In this case the Magistrate forbade certain persons from taking part in the worship and other religious ceremonies connected with certain temples. As to the right to perform these ceremonies the High Court had previously held that civil courts could not determine trivial questions of mere dignity or privilege. The previous decision of the civil court debarred the application of the section to the right in dispute.

But such rights have been held to come within the scope of the section as noted below.

As trivial questions of mere dignity or privilege should be excluded so sentimental caste objections to the use of a public street should not be countenanced by the Magistrate acting under the section. (*Sudalai Muthu Chettiar* v. *Enam Sambhu* 16 *Cr. L. J.* 767).

Cases coming within the section.

The right to perform a puja in a temple has been held as outside the scope of the section. (*Guiram Ghoshal* v.

Lalbehary Das 37 *Cal.* 573 *S. C.* 14 *C. W. N.* 611 *S. C.* 2 *C. L. J.* 22 but the contrary view has also been taken and it has been held that the right to perform religious ceremony in a mosque comes within the section (*Mahammad Musaliar* v. *Kunji Chek Musaliar* 11 *Mad.* 323) as also in a temple. (*Chedambara Gurukul* v. *Srigodu Gowdun* 27 *M. L. J.* 587).

A public right of way comes within the section. (*Karuppanna Gourdau* v. *Kandasami Gourdau* 26 *M. L. J.* 233).

A right of way or a right to the flow of water across the land of another is such a right as can be dealt with under the section. A dispute relating to such a right is clearly a dispute concerning the right of use of land or water.

A right of drawing water from a well threatened to be interfered with is within the scope of the section. (*Kannama Palaiyan Hindus* v. *Christians* 21 *M. L. J.* 486).

A right to the use of water from an artificial water channel for irrigation comes within the section. (*Manzur Hussain* v. *Gouri Lal Das* 20 *Cr. L. J.* 209).

A right to fish in a *jhil* comes within the section. (*Dukhi Modah* v. *Halway* 23 *Cal.* 55).

A right to collect *tolas* from a Hat on one day every year is within the scope of the section. (*Sarat Chandra Madak* v. *Mobarak Mullick* 21 *C. W. N.* 439 *S. C.* 24 *C. L. J.* 437).

A right of easement claimed by one party to moor boats against and to spread and dry fishing nets on the land of another party comes within the scope of the section. (*Kali Kumar Das* v. *Bejoy Goinda Moitra* 21 *Cr. L. J.* 697).

A right to take a car in procession along a public road to a temple is a right of user of land which falls within the scope of the section. (*Basappa Racchappa Belkeri In re* 27 *Bomb. L. R.* 1058).

Where one of the parties claimed the right to let off water by the natural course in which it had always flowed and would always flow as to prevent inundation of his own land and the other party erected a *bund* on the boundary of the first party's village it was held that the erection of the *bund* was an infringement of the natural right of every land holder to

the use and enjoyment of his own land and the case was a fit one under Sec. 147. (*Dowlat Koer* v. *Siva Prossad* 15 *C. L. J.* 267).

Where one party has a right of way over the land of another who obstructs such right and there is a likelihood of a breach of the peace in consequence of such obstruction the Magistrate is competent under Section 147 to direct the removal of the obstruction. (*Pasupaty Nath Bose* v. *Nando Lal Bose* 5 *C. W. N.* 67 ; *Lalit Chandra Neogi* v. *Tarini Prosad Gupta* 5 *C. W. N.* 335).

But it has also been held that an order to the police to remove a *bund* is one without jurisdiction. (*Dalmir Puri* v. *Khodadad Khan* 36 *Cal.* 923). If the Magistrate is of opinion that the public peace will be disturbed it will be open to him to bind down one or both of the parties under Sec. 107 Cr. P. C. (*Dalmir Puri*).

Order must be made on evidence.

As under Sec. 145 an order under Sec. 147 must be made on evidence and giving the parties sufficient opportunity to adduce evidence before the court. (*In he Alfred Lindsay* 4 *Mad.* 121. *Empress* v. *Ganpat Kalwar* 4 *C. W. N.* 779 ; *Syeo Mahomed Nur* v. *Bikram Mahton* 7 *C. W. N.* 510 ; *Pilagi* v. *Daryat* 20 *Cr. L. J.* 110 *Muthusami* v. *Kaluiga Moopan* 33 *M. L. J.* 78).

Scope and effect of the proviso.

The right must have been exercised within three months next before the institution of the enquiry if it is one which is exercisable at all times of the year. If it has not been so exercised no order can be made under the section protecting such right. What is the point of time referred to by the expression "institution of the enquiry?" Is it the date when the proceedings under the section are drawn up by the Magistrate or can it refer to any stage when the Magistrate is holding any enquiry necessary to satisfy himself as to the likelihood of a breach of the peace.

Necessity of finding under the proviso.

An order under the section cannot be passed without a finding under the proviso to the section that the right was exercised as required therein. (*Guru Prassad Dhur* v. *Lachman Ram Ghosh* 14 *Cr. L. J.* 30; *Balukhan* v. *Raj Kishore Pershad* 20 *Cr. L. J.* 558; *Grant* v. *Padarat Jha* 24 *Cr. L. J.* 463. *Sukamal Sing* v. *Bhuja Sing* 1924 *Pat.* 784 *S. C.* 25 *Cr L. J.* 996). But where the new exercise of the right within the proper period was due to circumstances beyond the control of the person claiming the right the proviso to Sec. 147 cannot apply. (*Basappa Radhappa Beltra* 27 *Bomb. L. R.* 1058)

In the case of a dispute as to a right of way the Magistrate may after enquiry under the section make an order declaring the existence of such right and protecting the exercise of such right. (*Muhammad Musa* v *Shyan Sundar Koeri* 64 *Ind. Cases* 131).

CHAPTER XXXV.

DISPUTE RELATING TO IMMOVEABLE PROPERTY CONTINUED.

Local enquiry and provision for costs in cases of dispute relating to immoveable property.

Local inquiry.

148. (*1*) Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(*2*) The report of the person so deputed may be read as evidence in the case.

(*3*) When any costs have been incurred by any party to a proceeding under this chapter the Magistrate passing a decision under Sec. 145, Sec. 146 or Sec. 147 may direct by whom such costs shall be paid whether by such party or by any other party to the proceeding and whether in whole or in part or proportion. *Such costs may include any expenses incurred in respect of witnesses, and of pleaders' fees, which the court may consider reasonable.*

The section provides for a local enquiry being made in connection with a proceeding under Section 145 or 147. The section says in so many words that a District Magistrate or a Sub-Divisional Magistrate may depute a subordinate Magistrate to hold the local enquiry. This power is not given to a mere

Magistrate of the first class who may be holding an enquiry under Secs. 145, 147. In the Code of 1872 in which for the first time a provision for local enquiry was introduced Sec. 533 which was taken from the provisions of Secs. 2 and 3 of Reg. 1 of 1824 authorised any Magistrate of the first class to depute a subordinate Magistrate for the purpose of the enquiry. In the Code of 1882 and the subsequent Codes this power has been given to District Magistrates and Sub-Divisional Magistrates only.

The District Magistrate or Sub-Divisional Magistrate when ordering a local enquiry may give necessary instructions to the subordinate Magistrates in connection with the enquiry.

In the Codes of 1872 and 1882 it was provided that such instructions were to be consistent with the law for the time being in force. This limitation as to instructions was removed in the Code of 1898. In all other respects the section has subsequently been the same in all the Codes.

A plain reading of the section shows that the enquiry is not to be held by the Magistrate trying the proceeding under Sec. 145 or 147 but by another officer. The reason is obvious. Parties will have an opportunity of cross-examining the Magistrate making the local enquiry and testing the correctness of his report.

The policy of the law is that trials should be confined to evidence before the court. Local inspection is permissible only to understand the evidence. If the Magistrate who tries a case himself holds a local inspection a change of officer is necessary if he is to be called into the witness box and cross-examined. At the same time an enquiry into a dispute relating to the possession of land or water is a typical case in which a local enquiry may be necessary. The very nature of the proceeding makes the necessity and usefulness of a local enquiry more plausible than in the case of a trial for an offence. The legislature has therefore made a special provision for local enquiry being made in such cases and that by some subordinate Magistrate carrying with him instructions from the trying officer evidently to verify or elucidate certain matters appearing on the evidence. In this view a local enquiry in connection

with a case under Sec. 145 or 147 cannot be made by the trying Magistrate himself and there is no provision for such an enquiry being made when the proceeding in question is being tried in the court of a mere Magistrate of the first class.

It was held however in *Rai Mohan Roy* v. *Prossanno Chandra* 5 *C. W. N.* 686 that the fact that Sec. 148 permits a superior Magistrate to depute a Magistrate subordinate to him to make a local enquiry does not prevent such a Magistrate from himself holding such enquiry.

It has been pointed out that the holding of the enquiry by the Magistrate himself is permissible provided the Magistrate records what he saw and does not act upon hearsay evidence. (*Dowlat Koer* v. *Siva Proshad* 15 *C. L. J.* 267 ; *Abdul Hamid* v. *Hasan Raza* 24 *Cr. L. J.* 487).

From the fact that no change was made in the section by the legislature it must be inferred that the view taken in the rulings aforesaid has not been disapproved by the legislature. The reason may be that the legislature did not think it necessary to disturb the decision aforesaid for on general principles a trying Magistrate may hold a local enquiry but that only to understand the evidence. If the trying Magistrate in a case under Sec. 145 or 147 himself holds a local enquiry he will be doing so not under Sec. 148 but an enquiry permissible in all cases. To understand the evidence on general principles he will have to keep a note of his enquiry on the record and parties will have the right to cross-examine him if necessary after getting the case transferred to some other court. In such cases no order as to expenses can be made under the section and the Magistrate's report cannot be read as evidence. The note of the inspection to be kept in the record is available to the parties just to ascertain whether it is necessary for them to challenge any matter referred to therein as likely to be prejudicial to their interest.

Scope of the local enquiry.

In the matter of *Baikunt Kamar* 3 *C. L. R.* 134 decided under the Code of 1872 Prinsep J. observed as to the scope of Sec. 533 as follows: "To me it appears that the local enquiry

to which it refers should be restricted solely to some question relating to the feature of the property about which the dispute has arisen and that it should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession. There is nothing in the Code which declares that the evidence which is taken in the course of that enquiry shall be evidence in the case but on the contrary the terms of the explanation to Sec. 530 expressly provide that the Magistrate who institutes the case may satisfy himself as to the existence of the dispute likely to induce a breach of the peace from the report or other information but the question of possession must be decided on evidence taken before him. There is nothing in Sec. 533 which declares that the evidence taken in the course of the local enquiry shall be evidence in the case such as there is in the Code of Civil Procedure relating to evidence taken by commissioners or Amin. Therefore I am inclined to think that the scope of a local enquiry under Sec. 533 is extremely limited and that the Magistrate's instructions must as stated in that section, be consistent with the law for the time being in force, that is to say, they are not to relate to any question of possession which must be decided solely upon the evidence taken before himself."

Although the words relating to the instructions being consistent with the law for the time being in force have been dropped in the Code of 1898 it does not make any difference for the law is now more clear than before that the question of possession should be decided on evidence. No change has been made in the section so as to detract in any way from the value of the observations quoted above and they may be taken to be an authoritative description of the scope of the section as it now stands.

It is only a Magistrate who can be deputed to make a local enquiry under the section. In this respect Sec. 148 differs from Sec. 202 under which the enquiry can be made by any person appointed for the purpose who may be a Magistrate or a police officer or a member of the public.

Under the Code of Criminal Procedure an "enquiry" is distinct from an "investigation." Sec. 4 (K) defines "enquiry" as including every enquiry other than a trial conducted under this Code by a Magistrate or court. Sec. 4 (L) defines "investigation" as including all the proceedings under the Code for the collection of evidence conducted by a police officer or by a person other than a Magistrate who is authorised by a Magistrate in this behalf. For this reason the word "enquiry" is used in Sec. 148 which contemplates a local enquiry by a Magistrate only and the words "enquiry or investigation" in Sec. 202 which contemplates a preliminary examination of the matter either by a Magistrate or by a person other than a Magistrate.

As far back as 1880 it was held by Garth C. J. and Maclean J. that local enquiry under Sec. 533 of the Code of 1872 could not be made by a Kanongoe (*Umacharan Santa* v. *Beni Madhab Roy* 7 *C. L. R.* 352) but Holmwood and Sharfuddin J. J. are reported to have taken a contrary view, that Sec. 148 is an enabling section and the deputing of a Kanongoe to make an enquiry under the section is not bad. (*Achambit Das* v. *Sarada Huldar* 12 *Cr. L. J.* 480).

In *Dowlat Koer* v. *Siva Pershad* 15 *C. L. J.* 267 it has been observed that the rule that in criminal cases courts are only justified in holding a local inspection in order to explain the facts appearing in evidence does not apply to cases under Sec. 147. To the same effect is *Abdul Hamid* v. *Hasan Raza* 24 *Cr. L. J.* 487.

Under Sub-section 2 the report of the person so deputed may be read as evidence in the case. It follows that when an enquiry under the section is held it becomes part of the proceedings in the case and the party affected by it is entitled to be made acquainted with the result of it and to have an opportunity of rebutting the deputed Magistrate's report if he thinks necessary to do so. (*Mir Dhunnoo* v. *Brown* 21 *W. R. Cr.* 25).

Costs.

Sub-section 3 provides for the making of an order for the payment of costs. The provision as to costs other than costs incurred in connection with a local enquiry was first introduced in the Code of 1882 (Sec. 148).

In the Code of 1882 and in that of 1898 before the amendment the provision was that "when any costs have been incurred by any party to a proceeding under this chapter for witnesses or pleaders' fees or both the Magistrate may direct by whom such costs shall be paid."

The amending Act of 1923 has now very much enlarged the scope of the section by laying down that when any costs have been incurred by any party the Magistrate may make an order for the payment of such costs by one party or other and that "such costs may include any expenses incurred in respect of witnesses and of pleaders which the court may consider reasonable."

It is clear then that the costs may be costs other than witnesses or pleaders' fees.

Commenting on the section as it stood before the amendment Sir Henry Prinsep observed "A Magistrate should exercise a reasonable discretion in assessing the costs to be paid by an unsuccessful party. He is not bound to make such party liable for all costs that may have been incurred by the opposite party but only such as were reasonably incurred in placing his case before the Magistrate. For instance it would not be reasonable for a Magistrate to order an unsuccessful party to pay the fees of several counsel or vakils engaged in a case when one or two would have been sufficient. This is the rule in taxing costs in civil court and this practice should be followed."

Before the amendment it was held that additional costs incurred for extra fees and travelling and other expenses of a like nature incurred by reason of bringing pleaders or counsel from a distance ought not to be allowed. (*Rajendro Narain Roy* v. *Mahomad Arzumand Khan* 9 *C. W. N.* 887 *S. C.* 1 *C. L. J.* 331).

Under the present section order may be made as to costs other than witnesses or pleaders' fees and so much of the amount expended on these accounts as may seem to be reasonable may be ordered to be paid.

When order for costs to be made.

An order for costs and the assessment should be made at the time of passing the decision under Sec. 145 in the presence of the parties. Such costs should not be ordered and assessed by the Magistrate after a long interval and without allowing all the parties affected an opportunity to appear and show cause. (*Q. E.* v. *Tomizuddi* 24 *Cal.* 757).

This rule has been modified in subsequent cases and it has been held that the order may be made subsequently but should be by the same Magistrate. (*Nafar Ch. Pal Chowdhury* v. *Sidhanto Krishna Mujumdar* 24 *C. W. N.* 672 *S. C.* 31 *C. L. J.* 34 : *Bansi Sing* v. *Syed Muhumed Akbar Adikhan* 15 *C. W. N.* 811). According to *Dilbasi Koer* v. *Doerati Koer* 10 *C. W. N.* 1030 the order may be made by a different Magistrate also.

All orders relating to costs must be made after due notice to both the parties (*Dilabasi Koer* v. *Deorati Koer* 10 *C. W. N.* 1030) and not behind the back of the person made liable for costs. (*Prokash Chunder Sarkar* v. *Ramprosad Patluck* 5 *C. W. N.* 291 *S. C.* 28 *Cal.* 302 ; *Dwarka Rai* v. *Nathuni Koeri* 19 *Cr. L. J.* 764).

An order for costs may be made subsequent to the passing of the judgment. (*Doulat Koer* v. *Siva Pershad* 15 *C. L. L.* 267 ; *Bansi Sing* v. *Syed Muhammed Akbar Adikhan* 15 *C. W. N.* 811 ; *Nafar Ch. Pal Chowdhury* v. *Sedharta Krishana Majumdar* 24 *C. W. N.* 672 *S. C.* 31 *C. L. J.* 34).

The provision that all costs directed to be paid may be recovered as if they are fines has been dropped by the amending Act of 1923.

Costs in connection with revision proceedings in the High Court.

Can the High Court in revising an order under Sec. 145 Cr. P. C. direct one party to pay costs to the other including the costs incurred by the successful party in the High Court?

The High Court can award costs of a revision petition against an order under Sec. 145 Cr. P. C. (*Bai Jiba* v. *Chandulal Ambalal* 27 *Bomb. L. R.* 1353).

A Full Bench of the Madras High Court has held in *Murappa Naidu* v. *Ayadayammal* 48 *Mad.* 262 that there is no such power in the High Court. Reliance has been placed on a previous decision of a Full Bench of the Madras High Court in *Sankarlinga Madalyar* v. *Narayana Madalyar* 45 *Mad.* 913. The learned judges seem to take the view that the decision of the previous Full Bench is conclusive on the point but it is difficult to understand how that can be so. The previous case referred to was one in which an application in revision was made to the High Court by a private party against an order of acquittal. This application was refused and the court was asked to direct the petitioner to give costs to the opposite party. This was refused on the ground that the High Court has no power in a criminal case to make an order as to costs.

The ratio decidendi of that decision may be gathered from the observations of Couts Trotter J.: "The whole machinery of revision is a creature of statute and has to be found within the four walls of the Code of Criminal Procedure and so far as criminal cases are concerned I do not see how we can possess an inherent power in ourselves to supplement the purely statutory machinery by assuming to ourselves the power of supplementing it by the awarding of costs. It is for the legislature to consider whether the power of revision in cases of the kind that we have seen in these proceedings has not outlived its usefulness or at any rate whether it should not be safeguarded by the arming of courts with the power at least in cases where revisional proceedings are taken by private prosecutors and not by the crown of mulcting them in proper cases by the award of costs."

The observation quoted above is undoubtedly sound so far as it goes but in consequence of the recent amendment of the Code the position has altogether been changed. In the first place orders made by Magistrates under Sec. 145 of the Code are now subject to the ordinary revisional powers of the High Court conferred by Sec. 439 of the Code under which the High Court may make any amendment or any consequential or incidental order that may be just and proper. There cannot be any doubt that the High Court may make the order which it is competent for the Magistrate to make but which he has omitted to make, in other words, the High Court can undoubtedly make an order as to the costs incurred in the court of the Magistrate. As to costs incurred in connection with the revisional proceedings in the High Court relief can, now, be granted by the High Court as an incidental order.

CHAPTER XXXVI.

RESTORATION OF POSSESSION OF IMMOVEABLE PROPERTY IN CASES OF CONVICTION FOR CERTAIN OFFENCES.

Power to restore possession of immoveable property.

522. (*1*) Whenever a person is convicted of an offence attended by criminal force *or show of force or by criminal intimidation* and it appears to the court that *by* such force *or show of force or criminal intimidation* any person has been dispossessed of any immoveable property, the court may, if it thinks fit, *when convicting such person or at any time within one month from the date of the conviction* order *the person dispossessed* to be restored to the possession of the same.

(*2*) No such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish in a civil suit.

(*3*) *An order under this section may be made by any Court of appeal, confirmation reference or revision.*

Provision on the subject was for the first time made in the Code of 1872 (Act X) in Sec. 534. The section found a place in Chapter XL of that Code along with Sec. 530 corresponding to Sec. 145.

In the Codes of 1882 and 1898 Sec. 522 was the section corresponding to Sec. 530 and was in terms identical with it. In 1923 Sec. 522 has been amended (1) so as to make a conviction attended by show of force or by criminal intimidation a ground for an order under the section (2) so as to permit the making of an order at the time of recording the conviction

or at any time within one month from the date of the conviction (3) so as to permit an order being made by a court of appeal, confirmation, reference or revision.

Analysis of the section.

(1) There must be a conviction for an offence.

(2) The offence committed must have been attended by criminal force or show of criminal force or by criminal intimidation. There must be a finding by the court as to this.

(3) There must be a finding by the court as to dispossession from any immoveable property in consequence of criminal force or show of force or criminal intimidation.

(4) The order is for restoring the party dispossessed to possession of the immoveable property in question.

(5) An order under the section is always subject to adjudication by the civil court.

The provision in Sec. 522 is analogous to that contained in Sec. 145, Sub-Sec. 4, proviso 1 read with Sub-Sec. 6.

The proviso to Sub-Sec. 4 of Sec. 145 enabling a Magistrate who finds that any party has been forcibly and wrongfully dispossessed within two months next before the date of the proceeding to treat such party as being in possession on the date of the proceeding was enacted for the first time in the Code of 1898. The Magistrate could declare such party to be entitled to possession and could forbid all disturbance of such possession until the decision of a civil court. "This" observed Sir Henry Prinsep in his Commentary "might amount to a restoration of possession in the same manner as by an order under Sec. 522."

The legislature has however in 1923 expressly provided in Sub-Sec. 6 that the person wrongfully and forcibly dispossessed within two months next before the date of the proceeding may be restored to possession by the Magistrate.

There are thus two provisions in the Code for restoration of possession of immoveable property (1) under Sub-Sec. 6, Sec. 145 read with Sub-Sec. 4 proviso and (2) under Sec. 522.

Object of the section.

The object of the provisions of Sec. 522 Cr. P. C. is to enable the criminal court by a summary order to restore the state of things which existed at the time of the dispossession by the convicted person or persons and the criminal court cannot go behind the state of affairs at the time of the dispossession by the convicted person or persons. (*Rameshwar Marwari* v. *Biswa Nath Banerji* 5 *C. W. N.* 374).

Condition precedent to the making of order.

Two conditions must be satisfied (1) Some person must have been convicted of an offence attended by criminal force (or under the section as now amended, by show of criminal force or criminal intimidation).

(2) Some person must have been dispossessed of immoveable property by such force (or, under the section as now amended, by show of force or criminal intimidation). (*Pottivadu* v. *Verayya* 26 *Mad.* 49 *S. C.* 12 *M. L. J.* 447 ; *Churaman* v. *Ram Lal* 25 *A.* 341 *S. C.* 1903 *A. W. N.* 59).

An order under Sec. 522 is not passed against any person but is passed in favour of the party dispossessed provided the conditions necessary to give the court jurisdiction to make that order are present. So though one of the accused concerned in the dispossession is acquitted and the other alone is convicted the court may order the restoration of possession notwithstanding that the order will operate against the acquitted person. (*Nur Mahommad Khan* v. *Muhammed Alo Khan* 22 *Cr. L. J.* 575).

Criminal force.

The term criminal force used in Sec. 522 must be understood as defined in Sec. 350 I. P. C. (*Srihari Shome* v. *Lalkhan* 5 *C. W. N.* 250).

Under Sec. 4 Sub-Sec. 2 all words and expressions used in the Code of Criminal Procedure and not defined therein but defined in the Indian Penal Code shall be deemed to have the meanings respectively attributed to them by the Code.

The expression "Criminal Force" is not defined in the Code of Criminal Procedure but defined in Sec. 350 of the Indian Penal Code as follows:—

Whoever intentionally uses force to any person, without that person's consent in order to the committing of any offence or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury fear or annoyance to the person to whom the force is used is said to use criminal force to that other.

Force is defined in Sec. 349 I. P. C. as follows:—

A person is said to use force to another if he causes motion change of motion or cessation of motion to that other or if he causes to any substance such motion or change of motion or cessation of motion as brings that substance into contact with any part of that other's body or with any thing which that other is wearing or carrying or with anything so situated that such contact affects that other's sense of feeling ; provided that the person causes the motion or change of motion or cessation of motion in one of the ways hereinafter described.

Firstly—By his own bodily power.

Secondly—By disposing of any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part or on the part of any other person.

Thirdly—By inducing any animal to move, to change its motion or to cease to move.

In some cases (*e.g., Srihori Shome* v. *Lal Khan* 5 *C. W. N.* 250) dispossession merely by show of force was held not to justify an order under the section while in others (*e.g. Chhakoo Mandal* v. *The Emp.* 11 *C. W. N.* 467) such dispossession was held to be a sufficient ground for an order under the section.

The legislature has now expressly included dispossession by show of force within the section.

Criminal intimidation.

Dispossession by criminal intimidation now comes within the section.

Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do or to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat commits criminal intimidation.

Explanation—A threat to injure the reputation of any deceased person in whom the person threatened is interested is within this section. (See 503 I. P. C.).

Offence attended by criminal force.

Criminal force need not be an ingredient of the offence in order to empower the Magistrate to make an order under Sec. 522. It is enough if it is merely attended by criminal force. (*Mohim Mohan Chowdhury* v. *Harendro Chandra Chowdhury* 31 *Cal.* 691 *S. C.* 8 *C. W. N.* 538 *F. B. Pottivadu* v. *Vurayya* 26 *Mad.* 49 *S. C.* 122 *M. L. J.* 447).

N.B.—Previous to the decision of the Full Bench in *Mohini Mohan Chowdhury* v. *Harendro Ch. Chowdhury* it had been held, for example, in *Ram Chandra Boral* v. *Jityandria* 25 *Cal.* 434 that under Sec. 522 criminal force must be an ingredient of the offence.

Where the accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complaint and his man it was held that their act clearly came under Sec. 522 (*Rameshwar Sing* v. *Emp.* 4 *Pat.* 438.)

Violence must have been caused to a person.

The definition of force in Sec. 349 implies that violence must have been caused to a person.

Where the accused was convicted of rioting for causing violence in the prosecution of a common object, *viz.*, by destroying the complainant's fencing and raising a new fencing on the complainant's lands it was held that violence having been caused to the fencing only and not to any person there was no

criminal force as defined in Sec. 349 and no order directing delivery of possession could be made under Sec. 522. (*Sadasiv Mandal* v. *Emp.* 18 *C. W. N.* 1150 see also *Balram Saha* v. *Chamru Sahu* 22 *Cr. L. J.* 329).

Trespass committed in the absence of the complainant.

Where the trespass was committed in the absence of the complainant it was held that an order under Sec. 522 could not be made in the case as it could be made only where dispossession was by the use of criminal force as defined in Sec. 350. (*Hari Chand* v. *Emp.* 20 *Cr. L. J.* 488 ; *Manji Ram* v. *Emp.* 26 *Punj. L. R.* 500).

But where unlawful possession was taken during the temporary absence of the owner and when the owner returned he was driven out by force an order under Sec. 522 was held to be proper. (*Maruthayee* v. *Appavu Pillai* 31 *M. L. T.* 388)

Any person who has been dispossessed of any immoveable property.

The person must be a specified person and the property must be specified property. An order vague and indefinite as to either of these two is bad.

Restored to possession.

The Magistrate may order the person dispossessed to be restored to possession. No special form for the order is provided in the Code.

Evidently the order is to be communicated to the police for being carried out.

The order.

The order may be contained in the judgment of conviction or it may be separate from it.

The order is binding between the parties to the order and can have no finality in favour of one who was not a party and did not claim under any party. (*Pakki Adinarayan* v. *Surama* 48 *Mad. L. J.* 372).

Time when order can be made.

It can be made at the time of recording the conviction or at any time, within one month from the date thereof.

Previous to the amendment of 1923 it had been held that an order could not be made subsequent to the conviction (*Mohan Theta* v. *Rai Chandra Basui* 4 *C. W. N.* 308). It was also held (*Nga Po Tok* v. *Emp.* 20 *Cr. L. J.* 115 ; *Jatindro Nath Chakravarti* v. *Emp.* 14 *Cr. L. J.* 172) that an order made without unreasonable delay after the conviction was good but the extreme view was taken in *Ghulam Muhammad* v. *Karam Sing* 15 *Cr. L. J.* 2,5 in which an order made twenty months after the conviction was pronounced to be legal. The legislature has now specified the time when it is permissible to make an order.

Appeal.

There is no appeal against the order itself but it comes up for consideration by the appellate court along with the conviction.

Order can be made by a court of appeal confirmation reference or revision. (Sub-Sec. 3).

Sub-Sec. 3 has been added in 1923 in consequence of the view taken that the appellate court could not make an order under the section. (*See Bhagabut Shaha* v. *Sadgir Ostager* 39 *Cal.* 1050 *S. C.* 16 *C. W. N.* 811).

Order can be set aside by an appellate court.

An appellate court has power under Sec. 423 Cl. (*d*) which authorises the appellate court to make any incidental order to set aside an order under Sec. 522 while affirming the conviction. (*Ugir Shiekh* v. *Syed Ali Shiekh* 19 *C. W. N.* 990).

If the conviction is set aside the order under Sec. 522 automatically goes because an order can be made only on conviction for certain offences.

When the appellate court reverses a conviction for the use of criminal force it is bound to set aside the order for pos-

session made by the lower court and restore the parties to their proper position. (*Rajathammal* v. *Raja Manikam* 1922 *M. W. N.* 356).

In *Ram Chandra Mistry* v. *Nobin Mirdha* 25 *Cal.* 630 *S. C.* 2 *C. W. N.* 225 it was held as follows:—

An order under the section must be subject to the general rule laid down by Sec. 404 of the Code that no appeal shall lie from any order of a criminal court except as provided for by the Code, while there is no provision made by the Code for an appeal from an order under Sec. 522. Nor can such an order be regarded as an integral part of the judgment appealed from so as to stand or fall according as the judgment is upheld or reversed. If that were so the legislature would no doubt have so provided. But it seems to have been intended that an order giving possession under the section being once made should in so far as the criminal courts are concerned, have finality. We are strengthened in this view by the consideration that in the case of orders made under Sec. 517 which falls within the same chapter of the Code very precise provisions are laid down by Sec. 520 in respect of the powers which may be exercised by superior courts.

This case was decided under the Code of 1882 in which Sec. 423 which deals with the powers of an appellate court had a more restricted scope than it now has. In 1898 the present clause (*d*) of Sec. 423 was added enabling an appellate court to make any amendment or any consequential or incidental order that may be just or proper and it was held (*Gourhari Gope* v. *Alay Gopini* 6 *C. W. N.* 713) that clause (*d*) of Sec. 423 authorised an appellate court to deal with an order under Sec. 522.

As stated above in *Ujir Shikh* 19 *C. W. N.* 990 clause (*d*) of Sec. 423 has been interpreted so as to empower an appellate court to affirm a conviction and set aside an order under Sec. 522.

An order under Sec. 522 may be compared with an order under Sec. 517 or 518, or 519 as also an order under Sec. 106.

So far as orders under Secs. 517, 518, 519 are concerned there is express provisions in Sec. 520 as to interference by an

appellate court. As to orders under Sec. 106 Sub-Sec. 2 thereof expressly provides that if the conviction is set aside on appeal or otherwise the bond shall become void. But in respect of orders under Sec. 522 the authority of an appellate court to set it aside is to be traced to clause (*d*) of Sec. 423. It is noteworthy that Sub-Sec. 2 of Sec. 106 and Sec. 520 found a place in the Code of 1882 in which there was no provision corresponding to clause (*d*) of Sec. 423 of the Code of 1898. In that state of things the view then taken in *Ram Chandra Mistry's Case* 25 *Cal.* 630 was the logical conclusion of a consideration of the relevant sections and having enacted the present Cl. (*d*) of Sec. 423 in the Code of 1898 the legislature thought it superfluous to make a provision in Sec. 522 as to the competency of the appellate court to set aside an order.

It is noteworthy that with reference to the case of *Gourhari Gopi* 6 *C. W. N.* 713 Sir Henry Prinsep in his Commentary observed "The correctness of this case may be open to doubt as the Code does not give the right of appeal against an order under Sec. 522 but only enables a court hearing an appeal to act under Sec. 522."

The enabling provision referred to in this remark is no doubt Cl. (*d*) of Sec. 423. The legislature has however in 1923 specially enacted an enabling provision for making an order in appeal in Sub-Sec. 3 Sec. 522.

This was necessitated by the contrary view expressed in some cases and as, since the passing of Act V of 1898, no court has doubted the power of an appellate court to set aside an order under Sec. 522 no express provision in respect thereof has been made in the section.

Appellate court to give notice to party affected before setting aside order.

Ordinarily in a criminal appeal the complainant is not entitled to any notice. Under Sec. 422 notice is to be given to the appellant and the crown but where an order under Sec. 522 has been made it must not be set aside behind the back

of the party affected by it. (*See Majidali Sardar* v. *Ali Asrab* 23 *C. W. N.* 862 *S. C.* 29 *Cal. L. J.* 167).

Revision.

The court of revision case exercise all the powers of an appellate court and can therefore set aside an order under Sec. 522.

Where the Magistrate convicted the accused of criminal trespass unattended by force and directed possession to be delivered to the complainant and the order was set aside by the High Court and the accused applied for delivery of possession to him it was held that the setting aside of the order directing possession carried with it the right to have the property delivered to the accused and the Magistrate had jurisdiction to direct the police to restore the accused to possession. (*Biswesbar Sing* v. *Bhola Nath Pathak* 18 *C. W. N.* 1147).

An order must not be set aside in revision without notice to the party affected by it.

Effect of Sub-Sec. 2.

The decision of a civil court as to the immoveable property dealt with under the section will always have a binding effect in supercession of the order made under the section.

The decision of the civil court may be sought by any person affected by the order including the accused.

Sub-Sec. 3.

A court of appeal, confirmation reference or revision may make an order. A court of appeal is the ordinary appellate court. A court of confirmation reference and revision is the High Court exercising jurisdiction in a case submitted to the High Court for the confirmation of a sentence of death passed by the Sessions judge (Sec. 374) and the same court dealing with a case submitted to it by the Sessions judge on disagreement between himself and jury (Sec. 307) and the same court acting under Sec. 439 respectively.

A view wholly untenable has been taken in *Luchman* v. *Emperor* 21 *A. L. J.* 871 that the lower appellate court has no jurisdiction to make an order when it was not made by the trial court and that under Sub-Sec. 3 the power is conferred only on the High Court. Surely the expression "court of appeal" includes the lower appellate court.

The Allahabad High Court had held that even the High Court ought not to make an order except in an exceptional case. (*Azi Ahmad* v. *Budhu Khan* 21 *A. L. J.* 459).

Does the time limit of one month apply to the court of appeal confirmation, etc.? The answer is given in the negative in *Rameshwar Sing* v. *Emp.* 4 *Pat.* 438.

CHAPTER XXXVII.

PREVENTIVE ACTION BY THE POLICE.

That department of the state which is primarily charged with the prevention and detection of crime is called the police.

The duties of a police officer are defined by statute but generally speaking there is hardly anything to which he may not have to attend as occasion arises. In an English statute the duties of a constable on duty are thus described—"During the time they shall be on duty they shall use their utmost endeavours to prevent any mischief by fire and also to prevent all robberies, burglaries and other felonies and misdemeanours and other outrages, disorders, and breaches of the peace ; and to apprehend and secure all felons rogues vagabonds and disorderly persons who shall disturb the public peace or any party or persons wandering, secreting or misbehaving himself, herself or themselves or whom they shall have reasonable cause to suspect of any evil designs; and to secure and keep in safe custody any such person, in order that he or she may be conveyed as soon as conveniently may be before a justice of the peace, to be examined and dealt with according to law ; and it shall and may be lawful to and for the said watch man, sergeants of the watch, patrols, and other person or persons to call and require any person or persons to aid and assist them in taking such felons rogues, vagabonds, and all disorderly or suspected persons as aforesaid. (3 and 4 Will IV, C. 90, S. 4.)"

The police Act (V of 1861) is the statute which constitutes and regulates the police force of this country excluding Presidency Towns for which special local Acts have been passed. As stated in the preamble the Act is intended to reorganise the police and make it a more efficient instrument for the prevention and detection of crime.

Sec. 23 of the Act describes the duties of a police officer thus—It shall be the duty of every police office promptly to

obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances to detect and bring offenders to justices and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists; and it shall be lawful for every police officer, for any of the purposes mentioned in this section without a warrant to enter and inspect any drinking shop, gaming houses or other place of resort of loose and disorderly characters.

Sec. 31 further provides that it shall be the duty of the police to keep order on the public roads and in the public streets, thoroughfares, ghats and landing places and at all other places of public resort and to prevent obstructions on the occasion of assemblies and processions on the public roads and in the public streets or in the neighbourhood of places of worship during the time of public worship and in any case when any road street thoroughfare ghat or landing place may be thronged or may be liable to be obstructed, defining the conditions on which alone such assembly or such procession is to be permitted to take place and otherwise giving effect to this section.

Provided that no fees shall be charged on the application for or grant of any such license.

He may also regulate the extent to which music may be used in the streets on the occasion of festivals and ceremonies.

Under Sec. 30-A any Magistrate or District Superintendent of police or Assistant District Superintendent of police or Inspector of police or any police officer in charge of a station may stop any procession which violates the conditions of a license granted under the last foregoing section and may order it or any assembly which violates any such conditions aforesaid to disperse.

Any procession or assembly which neglects or refuses to obey any order given under the last preceding sub-section shall be deemed to be an unlawful assembly.

Under Sec. 30 of the Police Act the District Superintendent or Assistant District Superintendent of Police may as occasion requires direct the conduct of all assemblies and processions

on the public roads or in the public streets or thoroughfares and prescribe the routes by which and the times at which such processions may pass.

He may also on being satisfied that it is intended by any persons or class of persons to convene or collect an assembly in any such road, street or thoroughfare or to form a procession which would in the judgment of the Magistrate of the District or of the Sub-division of a District, if uncontrolled, be likely to cause a breach of the peace require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license. On such application being made he may issue a license.

The Code of Criminal Procedure confers some powers on the police for the purpose of prevention of offences and defines their duties in this respect.

Under Sec. 54 any police officer may without an order from a Magistrate and without a warrant arrest any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking.

Under Sec. 55 any officer in charge of a police station may in like manner arrest or cause to be arrested

(*a*) any person found taking precautions to conceal his presence within the limits of such station under such circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(*b*) any person within the limits of such station who has no ostensible means of subsistence or who cannot give a satisfactory account of himself; or

(*c*) any person who is by repute an habitual robber, housebreaker or thief or an habitual receiver of stolen property knowing it to be stolen or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

This section applies also to the police in the town of Calcutta.

Under Sec. 62 no police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not in the absence of a special order of a Magistrate under Sec. 167 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court.

Sec. 167 provides as follows:—

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Sec. 61 and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station, or the police officer making the investigation, if he is not below the rank of sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial and considers further detention unnecessary he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Now the question arises does Sec. 167 apply to the case of a person arrested without warrant by the police under Sec. 55 against whom it is intended to take proceedings under Sec 109 or 110?

The language of Sec. 55 clearly shows that a person coming within its purview is a fit person to be proceeded with. Under Sec. 109 or 110 an investigation may be necessary in the case to collect evidence.

The police officer cannot detain him more than twenty-four hours without an order from a Magistrate. The only way to get an order from a Magistrate is to proceed under Sec. 167 which as amended now is not confined to an investi

gation under Chapter XIV. But Sec. 167 enjoins the police officer to transmit in forwarding the accused a copy of the entries in the diary relating to the case "hereinafter prescribed" *i.e.*, prescribed under Sec. 172. Sec. 172 however speaks of a police officer making an investigation under this chapter (Chap.XIV.). The investigation in Chap. XIV is the investigation in a cognizable case which a police officer may hold of his own accord (Sec. 156) and investigation into a non-cognizable case under orders of a Magistrate.

The change from "investigation under this chapter" to "investigation" only seems to indicate the intention of the legislature that investigations held otherwise than under Chap. XIV. may also be helped by the Magistrates under Sec. 167. This would clearly cover the case of investigation against a person arrested under Sec. 55 but the provisions about transmitting the diary stands in the way.

In these cases the person arrested will have to be produced before a Magistrate within 24 hours and the Magistrate if he thinks proper will draw up proceeding under Sec. 109 or 110 and the formal order under Sec. 112 will be read over to the person proceeded against or if he so desires the substance thereof shall be explained to him. Then the Magistrate may adjourn the enquiry under Sec. 344. He may in a fit case call for an *ad interim* bond under Sub-Sec. 3 Sec. 117 and until such bond is executed may detain the person proceeded against in custody. The power to remand the person proceeded against to custody under Sec. 344 will be available in the view that such person is an accused.

The power given by Sec. 55 should be exercised only when the officer in charge of a police station has good reason to apprehend that serious harm will result before he is able to go to a Magistrate who is empowered to deal with such a matter under Sec. 112.

Chap. XIII of the Code casts on the police certain specified duties by way of preventive action.

Every police officer may interpose for the purpose of preventing and shall to the best of his ability prevent the commission of any cognizable offence. (Sec. 149).

Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence. (Sec. 150).

A police officer knowing of a design to commit any cognizable offence may arrest without orders from a Magistrate and without a warrant the person so designing if it appears to such officer that the commission of the offence cannot be otherwise prevented. (Sec. 151).

A police officer may of his own authority interpose to prevent any injurv attempted to be committed in his view to any public property moveable or immoveable or the removal or injury of any public land mark or other mark used for navigation. (Sec. 152).

Any officer in charge of a police station may without a warrant enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept therein whenever he has reason to believe that there are in such place any weights, measures, or instruments for weighing which are false.

If he finds in such place any weights, measures or instruments for weighing which are false he may seize the same and shall forthwith give information of such seizure to a Magistrate having jurisdiction. (Sec. 153).

The officer or other person making any arrest under the Code may take from the person arrested any offensive weapons which he has about his person and shall deliver all weapons so taken to the court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested. (Sec. 53).

Under Sec. 10 of the Cattle Trespass Act (I of 1871) all officers of police shall, when required, aid in preventing (*a*) resistance to seizures by the cultivator or occupier of any land of any cattle trespassing on such land and doing damage thereto or to any crop or produce thereon and (*b*) rescues from persons making such seizures.

Under Sec. 64 every Forest officer and police officer shall prevent and may interfere for the purpose of preventing the commission of any forest offence.

Under Sec. 13 of the Lunacy Act (IV of 1912) every officer in charge of a police station may arrest or cause to be arrested all persons found wandering at large within the limits of his station whom he has reason to believe to be lunatics and shall arrest or cause to be arrested all persons within the limits of his station whom he has reason to believe to be dangerous by reasons of lunacy. Any person so arrested shall be taken forthwith before the Magistrate.

The same section enjoins that every officer in charge of a police station who has reason to believe that any person within the limits of his station is deemed to be a lunatic and is not under proper care and control or is cruelly treated or neglected by any relative or other person having the charge of him shall immediately report the fact to the Magistrate

CHAPTER XXXVIII.

PREVENTIVE ACTION BY THE PUBLIC GENERALLY.

Bentham thus expresses himself on the subject:—"Before an offence is committed it may give warning of its approach in many ways: it passes through a train of preparations which often allow it to be arrested before it reaches its catastrophe.

This part of police may be exercised either through functions assigned to all individuals alike or by special powers entrusted to authorised persons.

The powers given to all the citizens for their protection are those which are exercised before Justice takes cognizance of the matter and which may be called on that account ante-judicial means. Such is the right to oppose open force to the execution of an apprehended offence; to seize a suspected person; to guard him; to carry him before a Magistrate; to call in aid; to sequester into responsible hand articles believed to be stolen or those the destruction of which it is desired to prevent; to summon the bye-standers as witnesses; to require the passersby to assist in carrying before the Magistrates those who are suspected of bad designs.

The obligation of lending themselves to this service may be imposed upon all the citizens and its fulfilment should be strictly required as one of the most important duties of society. It will even be proper to establish rewards for those who may have aided to prevent an offence or who have assisted to bring the guilty into the hands of Justice."

Under Sec. 42 of the Code of Criminal Procedure every person is bound to assist a Magistrate or police officer reasonably demanding his aid, whether within or without the Presidency Towns (*a*) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; (*b*) in the prevention or suppression of a breach of the

peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

Sec. 43 provides for aid being rendered by any member of the public to a person other than a police officer when executing a warrant.

Under Sec. 44 the public are bound forthwith to give information to the nearest Magistrate or police officer of the commission of or of the intention of any other person to commit any of the offences mentioned in the section.

Sec. 45 imposes upon village headmen, accountants, landholders and their agents the duty to forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station any information which they may possess respecting the persons and the matters mentioned in the section.

Sec. 130 of the Railways Act contains a special provision with respect to the commission by children of acts endangering safety of persons travelling by railway and imposes an obligation on fathers and guardians of minors to take special care of their children and wards respectively, for, under this special provision when a minor under the age of twelve years is convicted of an offence under the Railways Act the court convicting him may, if it thinks fit, require the father or guardian of the minor to execute a bond binding himself in such penalty as the court directs to prevent the minor from being again guilty of any of those acts or omissions for which he was found guilty on the occasion in question.

If the father or guardian fails to execute the bond within the time fixed by the court he is liable to be punished with fine which may extend to fifty rupees.

Liability of every person under Secs. 42 and 44 Cr. P. C.

The responsibility is cast on every person whether male or female.

Reasonably demanding aid (Sec. 42).

This enlarges the scope of the Magistrate's discretion to acquit an accused prosecuted for non-compliance with Sec. 42

which is punishable under Sec. 187 I. P. C. It is always a question of fact to be decided regard being had to the circumstances of each particular case.

In the absence of reasonable excuse (Sec. 44).

The onus is on the accused to show the existence of reasonable excuse, the presumption of guilt being against him.

APPENDIX I.

Schedule V of the Code of Criminal Procedure—Forms.

X.—Bond to keep the peace.

(See section 107.)

Whereas I *(name)*, inhabitant of *(place)*, have been called upon to enter into a bond to keep the peace, for the term of, *or until the completion of the inquiry in the matter of now pending in the Court of*;

I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term *or until the completion of the said inquiry*; and in case of my making default therein, I hereby bind myself to forfeit to Her Majesty the Queen, Empress of India, the sum of rupees

Dated this day of 18 .

(Signature).

XI.—Bond for Good Behaviour.

(See sections 108, 109 and 110.)

Whereas I *(name)*, inhabitant of *(place)*, have been called upon to enter into a bond to be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects for the term of *(state the period), or until the completion of the inquiry in the matter of now pending in the Court of* I hereby bind myself to be of good behaviour to Her Majesty and to all Her subjects during the said term *or until the completion of the said inquiry;* and, in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees

Dated this day of 18

(Signature).

(Where a bond with sureties is to be executed, add)—We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to Her Majesty the Queen, Empress of India, and to all Her subjects during the said term; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Her Majesty the sum of rupees

Dated this day of 18

(Signature.)

XII.—Summons of information of a probable Breach of the Peace.

(*See section 114.*)

To of

Whereas it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (*or* by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (*or* by a duly authorized agent) at the Office of the Magistrate of on the day of 18 , at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees [*when sureties are required, add*, and also to give security by the bond of one (*or two, as the case may be*) surety (*or* sureties) in the sum of rupees (each *if more than one*)] that you will keep the peace for the term of .

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XIII.—Warrant of Commitment on Failure to find Security to keep the Peace.

(*See section 123.*)

To the Superintendent (*or* Keeper) of the Jail at

Whereas (*name and address*) appeared before me in person (*or* by his authorized agent) on the day of in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees with one surety (*or* a bond with two sureties each in rupees), that he, the said (*name*), would keep the peace for the period of months; and whereas an order was then made requiring the said (*name*) to enter into and find such security (*state the security ordered when it differs from that mentioned in the summons*) and he has failed to comply with the said order;

This is to authorize and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) unless he shall in the meantime [be lawfully ordered to be released] and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XIV.—Warrant of commitment on Failure to find Security for good Behaviour.

(*See section 123.*)

To the Superintendent (*or* Keeper) of the Jail at

Whereas it has been made to appear to me that (*name and description*) has been and is lurking within the district of having no ostensible means of subsistence (*or*, that he is unable to give any satisfactory account of himself);

or

Whereas evidence of the general character of (*name and description*) has been adduced before me and recorded, from which it appears that he is an habitual robber (*or* house-breaker, etc., *as the case may be*);

And whereas an order has been recorded stating the same and requiring the said (*name*) to furnish security for his good behaviour for the term of (*state the period*) by entering into a bond with one surety (*or* two or more sureties, *as the case may be*), himself for rupees , and the said surety (*or* each of the said sureties) for rupees , and the said (*name*) has failed to comply with the said order and for such default has been adjudged imprisonment for (*state the term*) unless the said security be sooner furnished;

This is to authorize and require you, the said Superintendent (*or* Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) unless he shall in the meantime be lawfully ordered to be released and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XV.—Warrant to discharge a Person imprisoned on Failure to give security.

(*See sections 123 and 124.*)

To the Superintendent (*or* Keeper) of the Jail at (*or other officer in whose custody the person is*).

Whereas (*name and description of prisoner*) was committed to your custody under warrant of the Court, dated the day of and has since duly given security under section of the Code of Criminal Procedure;

or

and there has appeared to me sufficient grounds for the opinion that he can be released without hazard to the community;

This is to authorise and require you forthwith to discharge the said (*name*) from your custody unless he is liable to be detained for some other cause.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XVI.—Order for the removal of Nuisances.

(*See section 133.*)

To (*name, description and address*).

Whereas it has been made to appear to me that you have caused an obstruction (*or* nuisance) to persons using the public roadway (*or other public place*) which, etc., (*describe the road or public place*), by, etc., (*state what it is that causes the obstruction or nuisance*), and that such obstruction (*or* nuisance) still exists;

or

Whereas it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (*state the particular trade or occupation and the place it is carried on*), and that the same is injurious to the public health (*or comfort*) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place;

or

Whereas it has been made to appear to me that you are owner (*or* are in possession of *or* have the control over) a certain tank (*or* well *or* excavation) adjacent to the public way (*describe the thoroughfare*), and that the safety of the public is endangered by reason of the said tank (*or* well *or* excavation) being without a fence (*or* insecurely fenced);

or

Whereas, etc., etc., (*as the case may be*);

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate*

the nuisance) or to appear at in the Court of on the , day of next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.;

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence and the part to be fenced*); or to appear, etc.;

or

I do hereby direct and require you, etc., (*as the case may be*).

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XVII.—Magistrate's Order constituting a Jury.

(*See section 138.*)

Whereas on the day of 18 , an order was issued to (*name*) requiring him (*state the effect of the order*), and whereas the said (*name*) has applied to me by a petition bearing date the day of , for an order appointing a Jury to try whether the said recited order is reasonable and proper; I do hereby appoint (*the names, etc., of the five or more Jurors*) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within days from the date of this order at my office at .

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XVIII.—Magistrate's Notice and Peremptory Order after the Finding by a Jury.

(*See section 140.*)

To (*name, description and address*).

I hereby give you notice that the Jury duly appointed on the petition presented by you on the day of

have found that the order issued on the day of requiring you (*state substantially the requisition in the order*) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (*state the time allowed*) on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XIX.—Injunction to provide against Imminent Danger pending Inquiry by Jury.

(*See section 142.*)

To (*name, description and address*).

Whereas the inquiry by a Jury appointed to try whether my order issued on the day of 18 , is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby under the provisions of section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (*state plainly what is required to be done as a temporary safeguard*), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XX.—Magistrate's Order prohibiting the Repetition, etc., of a Nuisance.

(*See section 143.*)

To (*name, description and address*).

Whereas it has been made to appear to me that, etc., (*state the proper recital, guided* by Form No. XVI or Form No. XXI, *as the case may be*);

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc. (*as the case may be*).

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XXI.—Magistrate's Order to prevent Obstruction, Riot, etc.

(See section 144.)

To (*name, description and address*).

Whereas it has been made to appear to me that you are in possession (*or* have the management) of (*describe clearly the property*), and that in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road;

or

Whereas it has been made to appear to me that you and a number of other persons (*mention the class of persons*) are about to meet and proceed in a religious procession along the public street, etc. (*as the case may be*), and that such procession is likely to lead to a riot or an affray;

or

Whereas, etc., etc. (*as the case may be*);

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road,

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*).

Given under my hand and the seal of the Court, this day of 18 .

(*Seal*) (*Signature.*)

XXII.—Magistrate's Order declaring Party entitled to retain Possession of Land, etc., in Dispute.

(See section 145.)

It appearing to me, on the grounds duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*), situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession

of the said (*the subject of dispute*), and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said (*name or names or description*) is true;

I do decide and declare that he is (*or* they are) in possession of the said (*the subject of dispute*) and entitled to retain such possession until ousted by due course of law and do strictly forbid any disturbance of his (*or* their) possession in the meantime.

Given under my hand and the seal of the Court, this day of 18.

(*Seal.*) (*Signature.*)

XXIII.—Warrant of Attachment in the Case of a Dispute as to the Possession of Land, etc.

(*See section 146.*)

To the Police-officer-in-charge of the Police-station at [*or*, To the Collector of].

Whereas it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and whereas, upon due inquiry into the said claims, I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [*or* I am unable to satisfy myself as to which of the said parties was in possession as aforesaid];

This is to authorize and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

XXIV.—Magistrate's Order prohibiting the doing of anything on Land or Water.

(*See section 147.*)

A dispute having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or* water) is claimed exclusively by (*describe the person or persons*) and it appearing to me on due inquiry into the same, that the said land (*or* water) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons describe him or them*) and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry (*or, if the use is enjoyable only at particular seasons, say* "during the last of the seasons at which the same is capable of being enjoyed");

I do order that the said (*the claimant or claimants of possession*), or any one in their interest, shall not take (*or* retain) possession of the said land (*or* water) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or* they) shall obtain the decree or order of a competent Court adjudging him (*or* them) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this day of 18 .

(*Seal.*) (*Signature.*)

THE REFORMATORY SCHOOLS ACT, 1897.

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Act No. VIII of 1897.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 11th March, 1897.)

An Act to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders.

Whereas it is expedient to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders; It is hereby enacted as follows:—

I.—Preliminary.

Title, commencement and extent.

1. (1) This Act may be called the Reformatory Schools Act, 1897; and

(2) It shall come into force at once.

(3) This section and section 2 shall extend to the whole of British India. The other sections shall extend in the

first instance to the whole of British India except the territories for the time being administered by the Lieutenant-Governor of the Punjab and the Chief Commissioner of Coorg, but either of the said Local Governments may at any time, by notification in the local official Gazette, extend these sections to their territories from such day as may be fixed in any such notification.

Repeal of Act V of 1876.

2. (1) The Reformatory Schools Act, 1876, is hereby repealed.

(2) But all proceedings taken, orders passed, officers appointed or authorised and rules made under the said Act shall, as far as may be, be deemed to have been respectively passed, appointed or authorised and made under this Act.

(3) Any enactment or document referring to the said Act shall, as far as may be, be construed to refer to this Act, or to the corresponding portion thereof.

Section 399 of Act X of 1882 repealed on date fixed by a notification under section 1, sub-section (3).

3. From the date fixed by any notification issued under section 1, sub-section (3), section 399 of the Code of Criminal Procedure, 1882, shall be repealed in the province to which the notification relates.

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen years:

(*b*) "Inspector General" includes any officer appointed by the Local Government to perform all or any of the duties imposed by this Act on the Inspector General: and

(*c*) "District Magistrate" shall include a Chief Presidency Magistrate.

II.—Reformatory Schools.

Power to establish and discontinue Reformatory Schools.

5. With the previous sanction of the Governor-General in Council, the Local Government may—

(*a*) establish and maintain Reformatory Schools at such places as it may think fit;

(*b*) use as Reformatory Schools kept by persons willing to act in conformity with such rules,

consistent with this Act; as the Local Government may prescribe in this behalf;

(c) direct that any school so established or used shall cease to exist as a Reformatory School or to be used as such.

Requisites of schools.

6. Every school so established or used must provide—

(a) sufficient means of separating the inmates at night;

(b) proper sanitary arrangements, water-supply, food, clothing and bedding for the youthful offenders detained therein;

(c) the means of giving such youthful offenders industrial training;

(d) an infirmary or proper place for the reception of such youthful offenders when sick.

Inspection of Reformatory Schools.

7. (1) Every school intended to be established or used as a Reformatory School shall, before being used as such, be inspected by the Inspector General, and if he finds that the requirements of section 6 have been complied with, and that, in his opinion, such school is fitted for the reception of such youthful offenders as may be sent there under this Act, he shall certify to that effect, and such certificate shall be published in the local official Gazette, together with an order of the Local Government establishing the school as a Reformatory School or directing that it shall be used as such, and the school shall thereupon be deemed to be a Reformatory School.

(2) Every such school shall, from time to time, and at least once in every year, be visited by the said Inspector General, who shall send to the Local Government a report on the condition of the school in such form as the Local Government may prescribe.

Power of Courts to direct youthful offenders to be sent to Reformatory Schools.

8. (1) Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the Court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the Court may, subject to any rules made by the Local Government, direct that, instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall be not less than three or more than seven years.

(2) The powers so conferred on the Court by this section shall be exercised only by (a) the High Court, (b) a Court of Session, (c) a District Magistrate, and (d) any

Magistrate specially empowered by the Local Government in this behalf, and may be exercised by such Courts whether the case comes before them originally or on appeal.

(3) The Local Government may make rules for—

(a) defining what youthful offenders should be sent to Reformatory Schools, having regard to the nature of their offences or other considerations, and

(b) regulating the periods for which youthful offenders may be sent to such schools according to their ages or other considerations.

Procedure where Magistrate is not empowered to pass an order under section 8.

9. (1) When any Magistrate not empowered to pass an order under the last foregoing section is of opinion that a youthful offender convicted by him is a proper person to be an inmate of a Reformatory School, he may, without passing sentence, record such opinion and submit his proceedings and forward the youthful offender to the District Magistrate to whom he is subordinate.

(2) The Magistrate to whom the proceedings are so submitted may make such further inquiry (if any) as he may think fit and pass such sentence and order for the detention in a Reformatory School of the youthful offender, or otherwise, as he might have passed if such youthful offender had been originally tried by him.

Power of Magistrates to direct boys under sixteen sentenced to imprisonment to be sent to Reformatory Schools.

10. The officer in charge of a prison in which a youthful offender is confined, in execution of a sentence of imprisonment, may bring him, if he has not then attained the age of fifteen years, before the District Magistrate within whose jurisdiction such prison is situate; and such Magistrate may, if such youthful offender appears to be a proper person to be an inmate of a Reformatory School, direct that instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School, and there detained for a period which shall be subject to the same limitations as are prescribed by or under section 8, with reference to the period of detention thereby authorised.

Preliminary enquiry and finding as to age of youthful offender.

11. (1) Before directing any youthful offender to be sent to a Reformatory School under section 8, section 9 or section 10, the Court or Magistrate shall inquire into the question of his age and, after taking such evidence (if any) as may be deemed necessary, shall record a finding thereon, stating his age as nearly as may be.

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass an order under section 8 before submitting his proceedings and forwarding the youthful offender to the District Magistrate as required by section 9, sub-section (1).

Government to determine Reformatory School to which such offenders shall be sent.

12. Every youthful offender directed by a Court or Magistrate to be sent to a Reformatory School shall be sent to such Reformatory School as the Local Government may, by general or special order, appoint for the reception of youthful offenders so dealt with by such Court or Magistrate:

Provided that, if accommodation in a Reformatory School is not immediately available for such youthful offender, he may be detained in the juvenile ward or such other suitable part of a prison as the Local Government may direct—

(a) until he can be sent to a Reformatory School, or

(b) until the term of his original sentence expires, whichever event may first happen. Should the term of his original sentence first expire, he shall thereupon be released, but, should he be sent to a Reformatory School, then the period of detention previously undergone shall be treated as detention in a Reformatory School.

Persons found to be over eighteen years not to be detained in Reformatory Schools.

13. (1) If at any time after a youthful offender has been sent to a Reformatory School it appears to the Committee of Visitors or Board of Management, as the case may be, that the age of such youthful offender has been understated in the order for detention, and that he will attain the age of eighteen years before the expiration of the period for which he has been ordered to be detained, they shall report the case for the orders of the Local Government.

(2) No person shall be detained in a Reformatory School after he has been found by the Local Government to have attained the age of eighteen years.

Discharge or removal by order of Government.

14 The Local Government may at any time order any youthful offender—

(a) to be discharged from a Reformatory School;

(b) to be removed from one Reformatory School to another such school situate within the territories subject to such Government: Provided that the whole period of his detention in a Reformatory School shall not be increased by such removal.

Power of Governor-General in Council to direct use of Reformatories in one province for reception of youthful offenders from another.

15. (1) The Governor-General in Council may by general or special order direct that any Reformatory School situated in one province shall be available for the reception of youthful offenders directed to be sent to any Reformatory School by any Court or Magistrate in any other province.

(2) Any such order may also provide for the removal of the youthful offender, and the cost of his maintenance, and may give any such further directions as may be necessary.

Certain orders not subject to appeal or revision.

16. Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

III.—Management of Reformatory Schools.

Appointment of Superintendent and Committee of Visitors or Board of Management.

17. (1) For the control and management of every Reformatory School, the Local Government shall appoint either (a) a Superintendent and a Committee of Visitors, or (b) a Board of Management.

(2) Every Committee and every Board so appointed must consist of not less than five persons, of whom two at least shall be natives of India.

(3) The Local Government may suspend or remove any Superintendent or any Member of a Committee or Board so appointed.

Superintendent may license youthful offenders to employers of labour.

18. (1) Every Superintendent so appointed may, with the sanction of the Committee, by license under his hand, permit any youthful offender sent to a Reformatory School, who has attained the age of fourteen years, to live under the charge of any trustworthy and respectable person named in the license, or any officer of Government or of a Municipality, being an employer of labour and willing to receive and take charge of him, on the condition that the employer shall keep such youthful offender employed at some trade, occupation or calling.

(2) The license shall be in force for three months and no longer, but may, at any time and from time to time until the expiration of the period for which the youthful offender has been directed to be detained, be renewed for three months at a time.

Cancellation of license.

19. The license shall be cancelled at the desire of the employer named in the license.

Determination of license.

20. If during the term of the license the employer named therein dies, or ceases from business or to employ labour, or the period for which the youthful offender has been directed to be detained in the Reformatory School expires, the license shall thereupon cease and determine.

Cancellation of license in case of ill-treatment.

21. If it appears to the Superintendent that the employer has ill-treated the youthful offender, or has not adequately provided for his lodging and maintenance, the Superintendent may cancel the license.

Superintendent to be deemed guardian of youthful offenders.

22. (*1*) The Superintendent of a Reformatory School shall be deemed to be the guardian of every youthful offender detained in such school, within the meaning of Act No. XIX of 1850 (*concerning the binding of apprentices*).

Power to apprentice youthful offender.

(*2*) If it appears to the Superintendent that any youthful offender licensed under section 18 has behaved well during one or more periods of his license, the Superintendent may, with the sanction of the Committee, apprentice him under the provisions of the said Act, and on such apprenticement the right to detain such youthful offender in a Reformatory School shall cease and the unexpired term (if any) of his sentence shall be cancelled.

Duties of Committee of Visitors.

23. (*1*) Every Committee of Visitors appointed under section 17 for a Reformatory School shall, at least once in every month,—

(*a*) visit the school, to hear complaints and see that the requirements of section 6 have been complied with, and that the management of the school is proper in all respects;

(*b*) examine the punishment-book;

(*c*) bring any special cases to the notice of the Inspector General; and

(*d*) see that no person is illegally detained in the school.

(*2*) If any member of a Committee of Visitors so appointed fails or neglects, during a period of six consecutive months, to visit the school and assist in the discharge of the duties aforesaid, he shall cease to be a member of such Committee.

Powers of Board of Management.

24. If, in exercise of the power conferred by section 17, the Local Government appoints a Board of Management for any Reformatory School, such Board shall have the powers and perform the functions of the Superintendent

under sections 18 to 22, both inclusive; and the license mentioned in section 18 may be under the hand of their chairman, and they shall be deemed to be the guardians of the youthful offenders detained in such school.

Power to appoint Trustees or other Managers of a school to be a Board of Management.

25. The Local Government may declare any body of Trustees or Managers of a school, who are willing to act in conformity with the rules referred to in section 5, clause (*b*) to be a Board of Management under this Act, and thereupon such body or Managers shall have all the powers and perform all the functions of such Board of Management.

Power of Board to make rules.

26. (*1*) With the previous sanction of the Local Government, every Board of Management of a Reformatory School may from time to time make rules consistent with this Act—

(*i*) to prescribe the articles which are to be deemed to be "prohibited articles"; and

(*ii*) to regulate—

(*a*) the conduct of business of the Board;

(*b*) the management of the school;

(*c*) the education and industrial training of youthful offenders;

(*d*) visits to, and communication with, youthful offenders;

(*e*) the terms and conditions under which any articles declared by the Board to be "prohibited articles" may be introduced into or removed out of the school;

(*f*) the manner in which such articles are to be removed when introduced without due authority;

(*g*) the conditions and limitations under which such articles may be supplied outside the school to any youthful offender under order of detention therein;

(*h*) the conditions on which the possession by any such youthful offender of such articles may be sanctioned;

(*i*) the penalties to be imposed for the supply or possession of such articles when supplied or possessed without due authority;

(*j*) the punishment of offences committed by youthful offenders; and

(*k*) the granting of licenses for the employment of youthful offenders.

(*2*) In the absence of a Board of Management the Local Government may make rules consistent with this Act to regulate for any Reformatory School the matters mentioned in any clause of sub-section (*1*), other than clause (*ii*) (*a*), and also the mode in which the Committee of Visitors shall conduct their business.

IV.—Offences in relation to Reformatory Schools.

Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders.

27. Whoever, contrary to any rule made under section 26, introduces or removes or attempts by any means whatever to introduce or remove into or from any Reformatory School, or supplies or attempts to supply outside the limits of any Reformatory School to any youthful offender under order of detention therein, any prohibited article,

and every officer, or person in charge of a Reformatory School who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any Reformatory School, to be possessed by any youthful offender detained therein or to be supplied to any such youthful offender outside its limits,

and whoever, contrary to any such rule, communicates or attempts to communicate with any such youthful offender,

and whoever abets any offence made punishable under this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.

Penalty for abetting escape of youthful offender.

28. Whoever abets an escape, or an attempt to escape on the part of a youthful offender from a Reformatory School, or from the employer of such youthful offender, shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding two hundred rupees, or with both.

Arrest of escaped youthful offender.

29. A police-officer may, without orders from a Magistrate and without a warrant, arrest any youthful offender sent to a Reformatory School under this Act, who has escaped from such school or from his employer, and take him back to such school or to his employer.

V.—Miscellaneous.

Application of Act XV of 1869 to youthful offenders detained in Reformatory Schools.

30. The provisions of the Prisoners' Testimony Act, 1869, shall be applied, so far as they can be made applicable, to youthful offenders detained in Reformatory Schools as if they were persons confined in jail within the meaning of that Act.

Power to deal in other ways with youthful offenders, including girls.

31. (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—

(a) discharged after due admonition, or

(b) delivered to his parent or to his guardian or nearest adult relative, on such parent, guardian or relative executing a bond, with or without sureties, as the Court may require to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months.

(2) For the purposes of this section the term "youthful offender" shall include a girl.

(3) The powers conferred on the Court by this section shall be exercised only by Courts empowered by or under section 8.

(4) When any youthful offender is convicted by a Court not empowered to act under this section and the Court is of opinion that the powers conferred by this section should be exercised in respect of such youthful offender, it may record such opinion and submit the proceedings and forward the youthful offender to the District Magistrate to whom such Court is subordinate.

(5) The District Magistrate to whom the proceedings are so submitted may thereupon make such order or pass such sentence as he might have made or passed if the case had originally been tried by him.

Procedure when youthful offender under detention in a Reformatory Schools is again convicted and sentenced.

32. When a youthful offender during his period of detention in a Reformatory School is again convicted by a Criminal Court, the sentence of such Court shall commence at once, notwithstanding anything to the contrary in section 397 of the Code of Criminal Procedure, 1882, but the Court shall forthwith report the matter to the Local Government, which shall have power to deal with the matter in any way in which it thinks fit.

THE CRIMINAL TRIBES ACT.

Act No. VI of 1924.

PASSED BY THE INDIAN LEGISLATURE.

(Received the assent of the Governor General on the 15th March, 1924.)

Whereas it is expedient to consolidate the law relating to criminal tribes; It is hereby enacted as follows:—

Preliminary.

Short title and extent.

1. (1) This Act may be called the Criminal Tribes Act, 1924.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "district" includes a Presidency-town and the town of Rangoon;

(2) "District Magistrate" means, in the case of a Presidency-town or the town of Rangoon, the Commissioner of Police;

(3) "prescribed" means prescribed by rules made under this Act; and

(4) "Superintendent of Police" means, in the case of a Presidency-town or the town of Rangoon, any officer appointed by the Local Government to perform the duties of a Superintendent of Police under this Act.

Notification of Criminal Tribes.

Power to declare any tribe, gang or class a criminal tribe.

3. If the Local Government has reason to believe that any tribe, gang or class of persons, or any part of a tribe, gang or class, is addicted to the systematic commission of non-bailable offences, it may, by notification in the local official Gazette, declare that such tribe, gang or class, or, as the case may be, that such part of the tribe, gang or class is a criminal tribe for the purposes of this Act.

Registration of Members of Criminal Tribes.

Registration of members of criminal tribes.

4. The Local Government may direct the District Magistrate to make or to cause to be made a register of the members of any criminal tribe, or part of a criminal tribe, within his district.

Procedure in making register.

5. Upon receiving such direction, the District Magistrate shall publish notice in the prescribed manner at the place where the register is to be made and at such other

places as he may think fit, calling upon all the members of the criminal tribe or part, as the case may be,—

(a) to appear at a time and place therein specified before a person appointed by him in this behalf;

(b) to give to that person such information as may be necessary to enable him to make the register; and

(c) to allow their finger-impressions to be recorded:

Provided that the District Magistrate may exempt any member from registration and may cancel any such exemption.

Charge of register.

6. The register, when made, shall be placed in the keeping of the Superintendent of Police, who shall, from time to time, report to the District Magistrate any alterations which ought in his opinion to be made therein, either by way of addition or erasure.

Alterations in register.

7. (1) After the register has been placed in the keeping of the Superintendent of Police, no person's name shall be added to the register, and no registration shall be cancelled, except by, or under an order in writing of, the District Magistrate.

(2) Before the name of any person is added to the register under this section, the Magistrate shall give notice in the prescribed manner to the person concerned—

(a) to appear before him or an authority appointed by him in this behalf at a time and place therein specified;

(b) to give to him or such authority such information as may be necessary to enable the entry to be made; and

(c) to allow his finger-impressions to be recorded.

Complaints of entries in register.

8. Any person deeming himself aggrieved by any entry made, or proposed to be made, in such register, either when the register is first made or subsequently, may complain to the District Magistrate against such entry, and the Magistrate shall retain such person's name on the register, or enter it therein or erase it therefrom, as he may think fit.

Power to take finger-impressions at any time.

9. The District Magistrate or any officer empowered by him in this behalf may at any time order the finger-impressions of any registered member of a criminal tribe to be taken.

Members of criminal tribes to report themselves or notify residence.

10. The Local Government may, by notification in the local official Gazette, issue in respect of any criminal tribe either or both of the following directions, namely, that every registered member thereof shall, in the prescribed manner,

(*a*) report himself at fixed intervals;

(*b*) notify his place of residence and any change or intended change of residence, and any absence or intended absence from his residence.

Restriction of movements of Criminal Tribes.

Power to restrict movements of, or settle criminal tribes.

11. (*1*) If the Local Government considers that it is expedient that any criminal tribe, or any part or member of a criminal tribe, should be—

(*a*) restricted in its or his movements to any specified area, or

(*b*) settled in any place of residence, the Local Government may, by notification in the Local official Gazette, declare that such criminal tribe, part or member, as the case may be, shall be restricted in its or his movements to the area specified in the notification, or shall be settled in the place of residence so specified, as the case may be.

(*2*) Before making any such declaration, the Local Government shall consider the following matters, namely:—

(*i*) the nature and the circumstances of the offences in which the members of the criminal tribe or part or the individual member, as the case may be, are or is believed to have been concerned;

(*ii*) whether the criminal tribe, part or member follows any lawful occupation, and whether such occupation is a real occupation or merely a pretence for the purpose of facilitating the commission of crimes;

(*iii*) the suitability of the restriction area, or of the place of residence, as the case may be, which it is proposed to specify in the notification; and

(*iv*) the manner in which it is proposed that the persons to be restricted or settled shall earn their living within the restriction area or in the place of residence, and the adequacy of the arrangements which are proposed therefor.

Power to vary specified area or place of residence.

12. The Local Government may by a like notification vary the terms of any notification issued by it under section 11 for the purpose of specifying another restriction area or another place of residence, as the case may be, and any officer empowered in this behalf by the Local Government may, by order in writing, vary any notification made under section 11 or under this section for the purpose of specifying another restriction area, or, as the case may be, another place of residence, in the same district.

Power of Local Government to restrict or settle criminal tribe in another province.

13. Any notification made by the Local Government under section 11 or section 12 may specify, as the restriction area or as the place of residence, an area or place situated in any other province, provided that the consent of the Local Government of that province shall first have been obtained.

Verification of presence of members of tribe within prescribed area or place of residence.

14. Every registered member of a criminal tribe, whose movements have been restricted or who has been settled in a place of residence in pursuance of any notification under section 11 or section 12, shall attend at such place and at such time and before such person as may be prescribed in this behalf.

Application of Act when criminal tribe is transferred from one province or district to another.

15. (1) Where, in pursuance of any such notification, any member of a criminal tribe is restricted in his movements to an area, or is settled in a place of residence, situated in a province other than that by the Local Government of which the notification under section 3 relating to the criminal tribe was issued, all the provisions of this Act and the rules made thereunder shall apply to him as if the notification under section 3 had been issued by the Local Government of such other province.

(2) If any criminal tribe, or any part of a criminal tribe, which has been registered under section 4 in any district, or any member of such tribe or part, is restricted in its or his movements to an area, or is settled in a place of residence, situated in another district (whether in the same province or not) the register or, as the case may be, the relevant entries or entry therein shall be transferred to the Superintendent of Police of the last mentioned district, and all the provisions of this Act and the rules made

thereunder shall apply as if the criminal tribe or part had registered in that district, and the District Magistrate of that district shall have power to cancel any exemption granted under section 5.

Settlements and Schools.

Power to place tribe in settlement.

16. The Local Government may establish industrial, agricultural or reformatory settlements and may order to be placed in any such settlement any criminal tribe, or any part or member of a criminal tribe, in respect of which or of whom a notification has been issued under section 11:

Provided that no such order shall be made unless the necessity for making it has been established to the satisfaction of the Local Government, after an inquiry held by such authority and in such manner as may be prescribed.

Power to place children in schools and to apprentice them.

17. (1) The Local Government may establish industrial, agricultural or reformatory schools for children, and may order to be separated and removed for their parents or guardians and to be placed in any such school or schools the children of members of any criminal tribe or part of a criminal tribe, in respect of which a notification has been issued under section 11.

(2) For every school established under sub-section (1), a Superintendent shall be appointed by the Local Government.

(3) The provisions of sections 18 to 22 of the Reformatory Schools Act, 1897, shall, so far as may be, apply in the case of every school for children established under this section as if the Superintendent of such school were a Superintendent and the children placed in such school were youthful offenders within the meaning of that Act.

(4) For the purposes of this section the term "children" includes all persons under the age of eighteen and above the age of six years.

(5) The decision of the District Magistrate as to the age of any person for the purposes of this section shall be final.

Power to discharge or transfer persons from settlement or school.

18. The Local Government or any officer authorised by it in this behalf may at any time, by general or special order, direct any person who may be in any industrial, agricultural or reformatory settlement or school in the province,—

(a) to be discharged, or

(b) to be transferred to some other settlement or school in the province.

Power to direct use of any settlement or school in British India for reception of persons.

19. Any order made under section 16, section 17 or section 18 may specify as the settlement or school in which any person is to be placed or to which he is to be transferred, as the case may be, any industrial, agricultural or reformatory settlement or school in any other province, provided that the consent of the Local Government of that province shall first have been obtained.

RULES.

Power to make rules.

20. (*1*) The Local Government may make rules to carry out the purposes and objects of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing power, such rules may provide for or regulate—

(*a*) the form and contents of the register referred to in section 4;

(*b*) the manner in which the notice referred to in section 5 shall be published and the means by which the persons whom it concerns, and the village-headmen, village-watchmen and landowners and occupiers of the village in which such persons reside, and the agents of such landowners or occupiers, shall be informed of its publication;

(*c*) the addition of names to the register and the erasure of names therein, and the mode in which the notice referred to in sub-section (*2*) of section 7 shall be given;

(*d*) the manner in which persons mentioned in section 10 shall report themselves, or notify their residence or any change or intended change of residence, or any absence or intended absence;

(*e*) the nature of the restrictions to be observed by persons whose movements have been restricted by notifications under section 11 or section 12;

(*f*) the circumstances in which members of a criminal tribe shall be required to possess and produce for inspection certificates of identity, and the manner in which such certificates shall be granted;

(*g*) the conditions as to holding passes under which persons may be permitted to leave the place in which they are settled or confined, or the area to which their movements are restricted;

(*h*) the conditions to be inserted in any such pass in regard to—

(*i*) the places where the holder of the pass may go or reside;

(*ii*) the persons before whom, from time to time, he shall be bound to present himself; and

(*iii*) the time during which he may absent himself;

(*i*) the place and time at which, and the persons before whom, members of a criminal tribe shall attend in accordance with the provisions of section 14;

(*j*) the authority by whom and the manner in which the inquiry referred to in section 16 shall be held;

(*k*) the inspection of the residences and villages of any criminal tribe;

(*l*) the terms upon which registered members of criminal tribes may be discharged from the operation of this Act;

(*m*) the management, control and supervision of industrial, agricultural or reformatory settlements and schools;

(*n*) the works on which, and the hours during which, persons placed in an industrial, agricultural or reformatory settlement shall be employed, the rate at which they shall be paid, and the disposal, for the benefit of such persons, of the surplus proceeds of their labour; and

(*o*) the discipline to which persons endeavouring to escape from any industrial, agricultural or reformatory settlement or school, or otherwise offending against the rules for the time being in force, shall be subject, the periodical visitation of such settlement or school and the removal from it of such persons as it shall seem expedient to remove.

PENALTIES AND PROCEDURE.

Penalties for failure to comply with terms of notice under section 5 or section 7.

21. Whoever, being a member of a criminal tribe, without lawful excuse, the burden of proving which shall lie upon him,—

(*a*) fails to appear in compliance with a notice issued under section 5 or section 7, or

(*b*) intentionally omits to furnish any information required under either of those sections, or,

(*c*) when required to furnish information under either of those sections, furnishes as true any information which he knows or has reason to believe to be false, or

(*d*) refuses to allow his finger-impressions to be taken by any person acting under an order passed under section 9,

may be arrested without warrant, and shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

Penalties for breach of rules.

22. (*1*) Whoever, being a registered member of a criminal tribe, contravenes a rule made under caluse (*e*), clause (*g*) or clause (*h*) of section 20 shall be punishable with imprisonment for a term which may extend,—

(*a*) on a first conviction, to one year,

(*b*) on a second conviction, to two years, and

(*c*) on any subsequent conviction, to three years,

or with fine which may extend to five hundred rupees, or with both.

(*2*) Whoever, being a registered member of a criminal tribe, contravenes any other rule made under section 20 shall be punishable,—

(*a*) on a first conviction, with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both; and

(*b*) on any subsequent conviction, with imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

(*3*) Any person who commits or is reasonably suspected of having committed an offence made punishable by this section which is not a cognizable offence as defined in the Code of Criminal Procedure, 1898, may be arrested without a warrant by any officer in charge of a police-station or by any police-officer not below the rank of a sub-inspector.

Enhanced punishment for certain offences by members of criminal tribe after previous conviction.

23. (*1*) Whoever, being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in Schedule I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished,—

(*a*) on a second conviction, with imprisonment for a term of not less than seven years, and

(b) on a third or any subsequent conviction, with transportation for life:

Provided that not more than one of any such convictions which may have occurred before the first day of March, 1911, shall be taken into account for the purposes of this sub-section.

(2) Nothing in this section shall affect the liability of such person to any further or other punishment to which he may be liable under the Indian Penal Code or any other law.

Punishment for registered members of criminal tribe found under suspicious circumstances.

24. Whoever, being a registered member of any criminal tribe, is found in any place under such circumstances as to satisfy the Court,—

(a) that he was about to commit or aid in the commission of, theft or robbery, or

(b) that he was waiting for an opportunity to commit theft or robbery,

shall be punishable with imprisonment for a term which may extend to three years, and shall also be liable to fine which may extend to one thousand rupees.

Arrest of registered person found beyond prescribed limits.

25. (1) Whoever, being a registered member of a criminal tribe,—

(a) is found in any part of British India, beyond the area or place of residence, if any, to which his movements have been restricted or in which he has been settled without the prescribed pass, or in a place or at a time not permitted by the conditions of his pass, or

(b) escapes from an industrial, agricultural or reformatory settlement or school,

may be arrested without warrant by any police-officer, village-headman or village-watchman, and may be taken before a Magistrate, who, on proof of the facts, shall order him to be removed to such area or place or to such settlement or school, as the case may be, there to be dealt with in accordance with this Act or any rules made thereunder.

(2) The rules for the time being in force for the removal of prisoners shall apply to all persons removed under this section or under any other provision of this Act:

Provided that an order from the Local Government or

from the Inspector General of Prisons shall not be necessary for the removal of such persons.

Duties of village-headmen, village-watchmen and owners or occupiers of land to give information in certain cases.

26. (1) Every village-headman and village-watchman in a village in which any members of a criminal tribe reside, and every owner or occupier of land on which any such persons reside, and the agent of any such owner or occupier, shall forthwith communicate to the officer in charge of the nearest police-station any information which he may obtain of—

(a) the failure of any such person to appear and give information when required to do so by a notice issued under section 5; or

(b) the departure of any registered member of a criminal tribe from such village or from such land, as the case may be.

(2) Every village-headman and village-watchman in a village, and every owner or occupier of land and the agent of any such owner or occupier, shall forthwith communicate to the officer in charge of the nearest police-station any information which he may obtain of the arrival at such village or on such land, as the case may be, of any persons who may reasonably be suspected of being members of any criminal tribe.

Penalty for breach of such duties.

27. Any village-headman, village-watchman, owner or occupier of land, and the agent of any such owner or occupier, who fails to comply with the requirements of section 26, shall be deemed to have committed an offence punishable under the first part of section 176 of the Indian Penal Code.

Power to deport certain criminal tribes to States in India.

28. The Local Government, if it is satisfied that adequate provision has been made by the law of any State in India for the restriction of the movements or the settlement in a place or residence of persons such as are referred to in section 3, and for securing the welfare of persons so restricted or settled, may, with the consent of the Prince or Chief of that State, direct the removal to that State of any criminal tribe, or part of a criminal tribe, for the time being in the province, and may authorise the taking of all measures necessary to effect such removal:

Provided that no person shall be so removed if the Local Government is satisfied that he is a subject of His Majesty.

SUPPLEMENTAL.

Bar of jurisdiction of Courts in questions relating to certain notifications.

29. No Court shall question the validity of any notification issued under section 3, section 11, or section 12, on the ground that the provisions hereinbefore contained or any of them have not been complied with, or shall entertain in any form whatever the question whether they have been complied with; but every such notification shall be conclusive proof that it has been issued in accordance with law.

Repeals.

30. The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof.

SCHEDULE I

(*See section 23*)

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460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.

SCHEDULE II.

(*See section 30*).

1	2	3	4
Year	Number	Short title	Extent of repeal
1911	III	The criminal Tribes Act, 1911	So much of the Act as has not been repealed.
1914	X	The Repealing and Amending Act, 1914	So much of Schedule II as relates to the Criminal Tribes Act, 1911.
1915	XI	The Repealing and Amending Act, 1915	So much of Schedule I as relates to the Criminal Tribes Act, 1911.
1920	XXXVIII	The Devolution Act, 1920	So much of Schedule I as relates to the Criminal Tribes Act, 1911.
1923	I	The Criminal Tribes (Amendment) Act, 1923	The whole Act

THE CATTLE TRESPASS ACT (I of 1871).

Sec. 10. The cultivator or occupier of any land, or any person who has advanced cash for the cultivation of the crop or produce on any land, or the vendee or mortgagee of such crop or produce, or any part thereof, may seize or cause to be seized any cattle trespassing on such land and doing damage thereto or to any crop or produce thereon and send them or cause them to be sent within twently-four hours to the pound established for the village in which the land is situate.

All officers of police shall, when required, aid in preventing (a) resistance to such seizures, and (b) rescues from persons making such seizures.

THE INDIAN FOREST ACT (VII of 1878).

Sec. 64. Every forest officer and police officer shall prevent and may interfere for the purpose of preventing the commission of any forest offence.

THE INDIAN LUNACY ACT (IV of 1912).

Sec. 13. (1) Every offier in charge of a police station may arrest or cause to be arrested all persons found wandering at large within the limits of his station whom he has reason to believe to be lunatics and shall arrest or cause to be arrested all persons within the limits of his station whom he has reason to believe to be dangerous by reason of lunacy. Any person so arrested shall be taken forthwith before the Magistrate.

(2) Every officer in charge of a police station who has reason to believe that any person within the limits of his station is deemed to be a lunatic and is not under proper care and control or is cruelly treated or neglected by any relative or other person having the charge of him, shall immediately report the fact to the Magistrate.

THE RAILWAYS ACT (IX of 1890).

Sec. 130. (1) If a minor under the age of twelve years is with respect to any railway guilty of any of the acts or omissions mentioned in any of the last foregoing sections, he shall be deemed, notwithstanding anything in section 82 or section 83 of the Indian Penal Code, to have

committed an offence, and the court convicting him may, if it thinks fit, direct that the minor, if a male, shall be punished with whipping, or may require the father or guardian of the minor to execute, within such time as the court may fix, a bond binding himself in such penalty as the court directs to prevent the minor from being again guilty of any of those acts or omissions.

(2) The amount of the bond, if forfeited shall be recoverable by the court as if it were a fine imposed by itself.

(3) If a father or guardian fails to execute a bond under sub-section (1) within the time fixed by the court, he shall be punished with fine which may extend to fifty rupees.

THE BENGAL CHILDREN ACT (11 of 1922).

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THE BENGAL CHILDREN ACT, 1922.

(As amended by Act V B. C. of 1923).

An Act to make further provision for the custody, trial and punishment of youthful offenders and for the protection of children and young persons.

Preamble. WHEREAS it is expedient to provide further for the custody, trial and punishment of youthful offenders and for the protection of children and young persons;

And whereas the previous sanction of the Governor-General has been obtained, under section 80A, sub-section (3), of the Government of India Act, to the passing of this Act;

It is hereby enacted as follows:—

CHAPTER I.

Preliminary.

Short title, commencement and local extent. 1. (1) This Act may be called the Bengal Children Act, 1922.

(2) It shall come into force in whole or in part on such date as the local Government may, by notification in the *Calcutta Gazette*, direct and for this purpose different dates may be appointed for different provisions of this Act and for different parts of the area defined in Sub-sec. (3).

(3) Subject to the provisions of section 27, this Act extends in the first instance to the town of Calcutta, as defined in section 3 of the Calcutta Police Act, 1866, the suburbs of Calcutta as defined by notification under section 1 of the Calcutta Suburban Police Act, 1866, the port of Calcutta as defined by notification under section 5 of

the Indian Ports Act, 1908, and the Municipality of Howrah, but the Local Government may, by notification in the *Calcutta Gazette*, extend it to any other town or place in Bengal.

Repeal of Act VIII of 1897.

2. The Reformatory Schools Act, 1897, with the exception of section 15 thereof, shall be deemed to be repealed—

(*a*) in the area to which this Act extends in the first instance under the provisions of section 1, sub-section (3), from the date of the commencement of this Act, and

(*b*) in any other town or place to which this Act may hereafter be extended under section 1, sub-section (3), from the date of such extension.

(Chapter I.—Preliminary.—Sections 3, 4.)

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(1) "child" means a person under the age of fourteen years, and when used in reference to a child sent to an industrial school it applies to that child during the whole period of detention, notwithstanding that the child attains the age of fourteen years before the expiration of that period;

(2) "guardian" in relation to a child, young person, or youthful offender, includes any person who, in the opinion of the Court having cognizance of any case in relation to the child, young person, or youthful offender, or in which the child, young person, or youthful offender is concerned, has for the time being the charge of or control over the child, young person, or youthful offender:

(3) "industrial school" means an industrial school established or certified by the Local Government under section 6;

(4) "prescribed" means prescribed by rules under this Act;

(5) "reformatory school" means a reformatory school established or certified by the Local Government under section 6;

(6) "young person" means a person who is fourteen years of age or upwards and under the age of sixteen years; and

(7) "youthful offender" means any person who has been convicted of an offence punishable with transportation

or imprisonment, and who at the time of such conviction was under the age of sixteen years.

Jurisdiction.

4. The powers conferred on Courts by this Act shall be exercised only by—

(*a*) the High Court,
(*b*) a Court of Session,
(*c*) a Court of an Additional Sessions Judge and of an Assistant Sessions Judge,
(*d*) a Juvenile Court constituted under this Act,
(*e*) a District Magistrate,
(*f*) a Sub-divisional Magistrate,
(*g*) a Presidency Magistrate,
(*h*) a Magistrate of the first class,
(*i*) any Magistrate of the second class specially empowered by the Local Government to exercise all or any of such powers,

and may be exercised by such Courts whether the case comes before them originally or in appeal or revision.

Procedure when Magistrate is not empowered to pass an order under this Act.

5. (*1*) When any Magistrate not empowered to pass an order under this Act is of opinion that a child or young person brought before him or convicted by him is a proper person to be sent to a reformatory or industrial school or to be dealt with in any other manner in which the case may be dealt with under this Act, he shall record such opinion, and submit his proceedings and forward the child or young person to the nearest Juvenile Court or Court of a Magistrate having authority to exercise powers under this Act and having jurisdiction in the case.

(*2*) The Court to which the proceedings are submitted under sub-section (*1*) may make such further inquiry (if any) as it may think fit and may make such order dealing with the case as such Court might have made if the child or young person had originally been brought before it.

CHAPTER II.

Reformatory and Industrial Schools.

Establishment and certification of schools.

6. (*1*) The Local Government may establish and maintain reformatory and industrial schools for the reception of youthful offenders and children who may be sent there in pursuance of this Act.

(2) The Local Government, on the application of or with the consent of the managers of any reformatory or industrial school not established under sub-section (1), may certify that such reformatory or industrial school is fit for the reception of youthful offenders or children to be sent there in pursuance of this Act; and may pay to the managers of such school such contributions as the Local Government may think fit for the maintenance thereof.

Management of schools.

7. (1) For the control and management of every reformatory or industrial school established under section 6, sub-section (1), a superintendent and a committee shall be appointed by the Local Government, and such superintendent and committee shall be deemed to be the managers of the school for the purposes of this Act.

(2) Every school certified under section 6, sub-section (2), shall be under the management of such persons as may be approved by the Local Government, and the persons so approved shall be deemed to be the managers of the school for the purposes of this Act.

(3) Where girls and boys are accommodated in any reformatory or industrial school, the accommodation provided for girls shall be in a separate building and compound.

Inspection of schools.

8. (1) The Local Government may appoint a chief inspector of reformatory and industrial schools and so many inspectors and assistant inspectors as they think fit to assist the chief inspector; and every person so appointed to assist the chief inspector shall have such of the powers and duties of the chief inspector as the Local Government direct, but shall act under the direction of the chief inspector.

(2) Every reformatory and industrial school shall, at least once in every six months, be inspected by the chief inspector, or by an inspector or assistant inspector:

Provided that when any such school is for the reception of girls only and such inspection is not made by the chief inspector, the inspection shall, when practicable, be conducted by a woman.

Power of inspectors.

9. The chief inspector, or an inspector, or an assistant inspector authorized in that behalf by the chief inspector, may, at any time, enter and inspect any reformatory or industrial school in all its departments.

Medical inspection.

10. Any qualified medical practitioner empowered in this behalf by the Local Government may visit any reformatory or industrial school at any time, with or without notice to its managers or other person in charge thereof,

in order to report to the chief inspector on the health of the inmates and the sanitary condition of the school:

Provided that, in the case of a school for girls only, such practitioner shall, when practicable, be a woman.

Power of Local Government to withdraw certificate.

11. The Local Government, if dissatisfied with the condition, rules, management, or superintendence of a certified school, may, at any time, by notice served on the managers of the school, declare that the certificate of the school is withdrawn as from the time specified in the notice, and, at that time, the withdrawal of the certificate shall take effect, and the school shall cease to be a certified school;

Provided that the Local Government may, if they think fit, instead of so withdrawing the certificate, by notice served on the managers of the school, prohibit the admission of youthful offenders or children to the school for such time as may be specified in the notice or until the notice is revoked:

Provided also that before the issue of notice under this section or under the first proviso thereto a reasonable opportunity shall be given to the managers of the school to show cause why the certificate shall not be withdrawn or admission to the school shall not be prohibited, as the case may be.

Resignation of certificate by managers

12. The managers of a certified school, on giving six months' notice in writing to the Local Government, through the chief inspector, of their intention so to do, many resign the certificate of the school, and, accordingly, at the expiration of six months from the date of the receipt of the notice by the chief inspector (unless before that time the notice is withdrawn), the resignation of the certificate shall take effect, and the school shall cease to be a certified school.

Effect of withdrawal or resignation of certificate.

13. No youthful offender or child shall be received into a certified school in pursuance of this Act after the date of the receipt by the managers of the school of a notice of withdrawal of the certificate for the school, or after the date of the issue of a notice of resignation of the certificate; but the obligation of the managers of the school, mentioned in section 16, to teach, train, lodge, clothe and feed any youthful offenders or children detained in the school at the respective dates aforesaid shall, except so far as the Local Government otherwise direct, continue until the withdrawal or resignation of the certificate takes effect.

Disposal of inmates when school ceases to be certified.

14. When a school ceases to be a certified school, the youthful offenders or children detained therein shall, by order of the Local Government, be discharged absolutely or on such conditions as the Local Government may impose or be transferred to some other reformatory or industrial school or auxiliary home in accordance with the provisions of this Act.

Auxiliary homes.

15. The Local Government may establish auxiliary homes for the reception of any inmates or any classes of inmates of reformatory or industrial schools, or may certify any other such home established before or after the passing of this Act by any other persons, and the certificate may be withdrawn or resigned in like manner as a certificate of a reformatory or industrial school; and every such home shall, for such purposes as may be specified by the Local Government, be treated as part of the school or schools to which it is attached.

Liabilities of managers.

16. The managers of a certified school may decline to receive any youthful offender or child proposed to be sent to them in pursuance of this Act, but when they have once accepted any such offender or child, they shall be deemed to have undertaken to teach and train and, further, if the school is residential, to lodge, clothe and feed him during the whole period for which he is liable to be detained in the school, or until the withdrawal or resignation of the certificate of the school takes effect:

Provided that the Local Government may, on an application made in that behalf by the managers of a certified school, arrange for the transfer of such offender or child to any other reformatory or industrial school.

CHAPTER III.

Youthful Offenders.

Bail of child or young person.

17. When a person apparently under the age of sixteen years is arrested and cannot be brought forthwith before a Court, the officer in charge of the police-station to which such person is brought may in any case and shall, unless the charge is one of culpable homicide or any other offence punishable with death or transportation, release him on bail, with or without sureties:

Provided that when a girl apparently under the age of sixteen years is arrested, the officer in charge of a police-station who has made the arrest, or before whom the

girl has been produced, shall release her at once if any person, who in his opinion is a sufficient surety, enters into a bond for such sum of money as the officer considers sufficient, to produce her before the Court and to appear in her stead, if required, at the police-station.

Custody of child or young person not released on bail.

18. (1) When a person apparently under the age of sixteen years having been arrested is not released on bail as provided in section 17, the officer in charge of the police-station shall cause him to be detained in a place other than a police-station or jail in the prescribed manner, until he can be brought before a Court.

(2) No police-officer shall, however, detain in custody any such person for a longer period than is reasonable under all the circumstances of the case; and such period shall not, in the absence of a special order of a Court, exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Court.

Remand or committal to custody.

19. A Court, on remanding or committing for trial a child or young person who is not released on bail as provided in section 17, shall, instead of committing him to prison, order him to be detained in a place other than a police-station or jail in the prescribed manner, for the period for which he is remanded.

Attendance at Court of parent of child or young person charged with an offence, etc.

20. (1) When a child or young person is charged with any offence, or when a child is brought before a Court on an application for an order to send him to an industrial school, his parent or guardian may, in any case, and shall, if he can be found and resides within a reasonable distance and the person so charged or brought before the Court is a child, be required to attend at the Court before which the case is heard, during all the stages of the proceedings, unless the Court is satisfied that it would be unreasonable to require his attendance.

(2) When the child or young person is arrested, the officer in charge of the police-station to which he is brought shall forthwith inform the parent or guardian, if he can be found, of such arrest, and shall also cause him to be warned to attend at the Court before which the child or young person will appear.

(3) The parent or guardian, whose attendance is required under this section, shall be the parent or guardian having the actual possession and control of the child or young person:

Provided that if the parent or guardian is a person other than the father, the attendance of the father or, if

the father is dead or cannot be found, the attendance of the nearest adult male relative may also be required.

(4) The attendance of the parent of a child or young person shall not be required under this section in any case where the child or young person was, before the institution of the proceedings, removed from the custody or charge of his parent by an order of a Court.

(5) Nothing in this section shall be deemed to require the attendance of the mother or the female guardian of a child or young person, if such mother or female guardian does not, according to the customs and manners of the country, appear in public, but any such person may appear before the Court by a pleader or agent.

Restrictions on punishment of children and young persons.

21. Notwithstanding anything to the contrary contained in any law, no child or young person shall be sentenced to death, transportation or imprisonment or committed to prison in default of payment of a fine or in default of furnishing security:

Provided that a young person may be sentenced to imprisonment or committed to prison as aforesaid when the Court certifies that he is of so unruly or so depraved a character that he is not a fit person to be sent to a reformatory school and that none of the other methods in which the case may legally be dealt with is suitable.

Mode of Sending Youthful Offenders to Reformatory or Industrial Schools.

Commitment of offenders between twelve and sixteen years of age to reformatory or industrial schools.

22. (1) When a youthful offender, who in the opinion of the Court before which he is charged is twelve years of age or upwards, is convicted of an offence punishable with transportation or imprisonment, the Court may, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a reformatory school:

Provided that when the offender is ordered to be sent to a reformatory school he shall not in addition be sentenced to imprisonment.

(2) When a youthful offender of twelve years of age or upwards has been sentenced to transportation or imprisonment, the Local Government may direct that, in lieu of undergoing or completing such sentence, he shall be sent to a reformatory school; and thereupon the offender shall be subject to all the provisions of this Act as if he

had been originally sentenced to detention in a reformatory school.

(3) When a youthful offender, who in the opinion of the Court before which he is charged is under twelve years of age, is convicted of an offence punishable with death, transportation or imprisonment, the Court may order that he be sent to an industrial school.

(4) When a youthful offender of the age of twelve or thirteen years, who has not previously been convicted, is convicted of an offence punishable with transportation or imprisonment, and the Court is satisfied that the youthful offender should be sent to an industrial school, but, having regard to the special circumstances of the case, should not be sent to a reformatory school, and is also satisfied that the character and antecedents of the youthful offender are such that he will not exercise an evil influence over the other inmates of an industrial school, the Court may order the youthful offender to be sent to an industrial school after previously ascertaining that the managers are willing to receive him:

Provided that the Local Government may, on the application of the managers of the industrial school, by order, transfer the youthful offender to a reformatory school.

(5) When a young person has been ordered by a Court to give security under section 106 or section 118 of the Code of Criminal Procedure, 1898, and has failed to do so, the Court which made the order may order such young person to be sent to a reformatory school.

Period of detention.

23. Every order, in pursuance of which a youthful offender or child is sent to a reformatory or industrial school, shall specify the time for which the youthful offender or child is to be detained in the school being—

(a) in the case of a youthful offender sent to a reformatory school, not less than two and not more than five years, but not in any case extending beyond the time when the youthful offender will, in the opinion of the Court, attain the age of eighteen years; and

(b) in the case of a child sent to an industrial school, such time as to the Court may seem proper for the teaching and training of the child, but not in any case extending beyond the time when the child will, in the opinion of the Court, attain the age of sixteen years.

Other ways of Dealing with Youthful Offenders.

Power to discharge youthful offender or to commit him to suitable custody.

24. A Court may, if it shall think fit, instead of directing any youthful offender to be detained in a reformatory or industrial school, order him to be—

(a) discharged after due admonition, or

(b) committed to the custody of his parent or guardian or any adult relative, or failing any such person, or if any such person is found unfit by the Court, then to the custody of any trustworthy and respectable person, on such parent, guardian, relative or person executing a bond, with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months.

and the Court may, in addition to such order, make an order that the youthful offender be placed under the supervision of a person to be named by the Court.

Power to order parent to pay fine, etc.

25. (1) When a child or young person is convicted of an offence punishable with fine and the Court is of opinion that the case would be best met by the imposition of a fine, whether with or without any other punishment, the Court may, in any case, and shall, if the offender is a child, order that the fine be paid by the parent or guardian of the child or young person, unless the Court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

(2) An order under this section may be made against a parent or guardian who, having been required to attend, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(3) Any order directing that a parent or guardian shall pay a fine under this section may be enforced as though it were an order passed under the Code of Criminal Procedure, 1898.

(4) A parent or guardian may appeal against any such order as if it had been an order passed in proceedings against himself.

Detention in the case of certain crimes committed by children.

26. (1) When a child is convicted of an offence of so serious a nature that the Court is of opinion that no punishment which under the provisions of this Act it is authorized to inflict is sufficient, the Court shall order the offender to be kept in safe custody in such place or manner

as it thinks fit, and shall report the case for the orders of the Local Government.

(2) Notwithstanding the provisions of section 21, the Local Government may order any such child to be detained in such place and on such conditions as they think fit, and whilst so detained the child shall be deemed to be in legal custody:

Provided that no period of detention so ordered shall exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed:

Provided also that at any time during the period of such detention the Local Government may, if they think fit, direct that in lieu of such detention the youthful offender be kept in a reformatory school until he has attained the age of eighteen.

CHAPTER IV.

Mode of Sending Neglected Children to Industrial Schools.

Children sent to industrial schools.

27. (1) In any area to which the Local Government may, by notification in the *Calcutta Gazette*, direct that this section or any portion of it shall apply, a Court having jurisdiction under this Act—

(*i*) upon receiving a petition in this behalf, or

(*ii*) upon a police report, or

(*iii*) upon its own knowledge or suspicion,

may, either by a summons to the parent or guardian of a child apparently under the age of fourteen years or by a warrant to be executed by a police-officer not below the rank of sub-inspector or by some other person authorized by the Local Government in this behalf, order the production of such child on such a day as may be specified in the summons or warrant if the Court has reason to believe that the child—

(*a*) lives by begging; or

(*b*) is destitute, not being an orphan and having both parents, or his surviving parent, or in the case of an illegitimate child his mother, undergoing transportation or imprisonment; or

(*c*) is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child; or

(*d*) is under the care of a parent or guardian who habitually neglects or cruelly ill-treats the child; or

(*e*) frequents the company of any reputed thief or prostitute; or

(*f*) is living in circumstances calculated to cause, encourage or favour the seduction or prostitution of the child.

(*2*) In any such area, any person authorized by the Local Government in this behalf may bring before a Juvenile Court or Court of a Magstrate having jurisdiction under this Act any child apparently under the age of fourteen years who—

(*a*) is found in any street or place of public resort begging or receiving alms (whether or not there is any pretence of singing, playing, performing, offering anything for sale, or otherwise), or being in any such street or place for the purpose of so begging or receiving alms; or

(*b*) is found wandering and not having any home or settled place of abode, or visible means of subsistence, or is found wandering and having no parent or guardian, or a parent or guardian who does not exercise proper guardianship; or

(*c*) is found destitute, not being an orphan and having both parents or his surviving parent, or in the case of an illegitimate child his mother, undergoing transportation or imprisonment; or

(*d*) frequents the company of any reputed thief or prostitute; or

(*e*) lives in houses of ill-fame; or

(*f*) is subject to cruel treatment;

and the Court before which a child is brought as coming within one of those descriptions shall examine the information and record the substance of such examination, and shall, if it thinks that there are sufficient grounds for inquiring further, fix a date for such inquiry.

(*3*) On the date fixed for the production of the child under sub-section (*1*) or for the inquiry under sub-section (*2*), or on any subsequent date to which the proceedings may be adjourned, the Court shall hear and record all evidence which may be adduced and consider any cause which may be shown why an order sending the child to an industrial school should not be passed and make any further inquiry it thinks fit.

(*4*) If, after inquiry, the Court is satisfied that it is expedient to send the child to an industrial school, it shall pass an order to that effect.

(5) If, after inquiry, the Court is satisfied that the child has been living by begging at the instance or for the profit of any person who is a professional keeper of begging children, then the Court may direct such person to appear before it and, after hearing him in his defence, may, in its discretion, direct him to pay towards the cost of the proceedings any amount not exceeding twenty-five rupees, and such cost shall be realizable under the provisions of the Code of Criminal Procedure, 1898, as if it were a fine.

Power to commit child or young person to suitable custody.

28. (1) When under this Act a Court is empowered to order a child to be sent to an industrial school. the Court, in lieu of ordering him to be so sent, may make an order for the committal of the child to sutable custody in the prescribed manner, until he attains the age of sixteen years, or for any shorter period.

(2) Any person authorized by the Local Government in this behalf may bring before a Juvenile Court or Court of a Magistrate having authority to exercise powers under this Act and having jurisdiction in the case any young person apparently of the age of fourteen or fifteen years so circumstanced, that if he were a child, he would come within one or other of the descriptions mentioned in section 27, and the Court, if satisfied, after inquiry in the manner prescribed by section 27, sub-sections (2) and (3), that it is expedient so to deal with him, may make an order for his committal to suitable custody in the prescribed manner, until he attains the age of sixteen years, or for any shorter period.

(3) The Court which makes an order committing a child or young person to suitable custody under this section may, in addition, order that the child or young person be placed under the supervision of a person to be named by the Court.

(4) Notwithstanding anything contained elsewhere in this Act, no order shall be passed sending a child to an industrial school, unless the Court is satisfied that accommodation suitable for such child is available.

Power to Local Government to restore child to parent or relative.

29. The Local Government, at the request of the Court or on the application of a parent or relative of the child, may make an order directing the restitution on such conditions as may be specified in the order of any child, who having been dealt with by a Court under section 27, sub-section (4), has either been sent to an industrial school or committed under section 28, to such parent or relative of

the child as the Local Government may select; and the order passed by the Court in respect of such child shall thereupon be deemed to be modified accordingly.

Care of girls.

30. If it appears to a Court, on the complaint of any person, that a girl under the age of sixteen years is being treated with cruelty by her parent or guardian or that such girl, with the knowledge of her parent or guardian, is exposed to the risk of seduction or prostitution or living a life of prostitution, the Court may direct the parent or guardian to enter into a recognizance to exercise due care and supervision in respect of such girl.

CHAPTER V.

Maintenance and Treatment of Persons in Reformatory or Industrial Schools or Under Custody.

Contribution of parent.

31. (1) The Court which makes an order for the detention of a youthful offender or child in a reformatory or industrial school, or for the committal of a child or young person to suitable custody under this Act, may order the parent or other person liable to maintain the youthful offender, young person or child to contribute to his maintenance, if able to do so, in the prescribed manner.

(2) The Court, before making an order under sub-section (1), shall inquire into the circumstances of the parent or other person liable to maintain the youthful offender, young person or child, and shall record the evidence, if any, in the presence of the parent or such other person, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader.

(3) The persons liable to maintain a youthful offender, young person or child shall, for the purposes of sub-section (1), include, in the case of illegitimacy, his putative father against whom an order under section 488 of the Code of Criminal Procedure, 1898, has already been passed, or who has been otherwise declared to be the putative father by any competent Court or authority:

Provided that where the youthful offender, young person or child is illegitimate and an order for his maintenance has been made under section 488 of the Code of Criminal Procedure, 1898, the Court shall not ordinarily make an order for contribution against the putative father, but may order the whole or any part of the sums accruing due under the said order for maintenance to be paid to

such person as may be named by the Court, and such sums shall be applied by him towards the maintenance of the youthful offender, young person or child.

(4) Any order under this section may be enforced in the same manner as an order under section 488 of the Code of Criminal Procedure, 1898.

Boarding out of children

32. The managers of an industrial school to which a child under the age of eight years is sent may, with the consent in writing of the chief inspector, board the child out with any suitable person until the child reaches the age of ten years, and thereafter for such longer period, with the consent in writing of the chief inspector, as the managers consider to be advisable in the interests of the child, subject to the exercise by the managers of such powers as to supervision, recall, and otherwise as may be prescribed; and, when a child is so boarded out, he shall, nevertheless, be deemed, for the purposes of this Act, to be a child detained in the school, and the provisions of this Act shall apply accordingly, so far as possible.

Placing out on license.

33. (1) When a youthful offender or child is detained in a reformatory or industrial school, the managers of the school may, at any time, with the consent in writing of the chief inspector, by license, permit the youthful offender or child, on such conditions as may be prescribed, to live with any trustworthy and respectable person named in the license willing to receive and take charge of him with a view to train him for some useful trade or calling.

(2) Any license so granted shall be in force until revoked or forfeited by the breach of any of the conditions on which it was granted.

(3) The managers of the school may, at any time by order in writing, revoke any such license, and order the youthful offender or child to return to the school, and shall do so at the desire of the person to whom the youthful offender or child is licensed.

(4) If the youthful offender or child refuses or fails to return to the school, the managers of the school may, if necessary, arrest him, or cause him to be arrested, and may take him, or cause him to be taken, back to the school.

(5) The time during which a youthful offender or child is absent from a reformatory or industrial school in pursuance of a license under this section shall be deemed to be part of the time of his detention in the school:

Provided that, when a youthful offender or child has failed to return to the school on the license being revoked

or forfeited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is to be detained in the school.

Power to order parent to produce a youthful offender or child who refuses to return to a school.

34. (1) When a license has been revoked or forfeited and the youthful offender or child refuses or fails to return to the school, a Court, if satisfied by information on oath that there is reasonable ground for believing that his parent or guardian could produce the youthful offender or child, may issue a summons requiring the parent or guardian to attend at the Court on such a day as may be specified in the summons, and to produce the child, and, if he fails to do so without reasonable excuse, he shall, in addition to any other liability to which he may be subject under the provisions of this Act or any other law, be liable to a fine not exceeding twenty-five rupees.

(2) Any order directing that a parent or guardian shall pay a fine under this section may be enforced as though it were an order passed under the Code of Criminal Procedure, 1898.

Penalty for abetting escape of youthful offender or child.

35. Whoever—

(a) knowingly assists or induces, directly or indirectly, a youthful offender or child detained in or placed out on license from a reformatory or industrial school to escape from the school or from any person with whom he is placed out on license; or any child or young person to escape from the person to whose custody he is committed under this Act; or

(b) knowingly harbours, conceals, or prevents from returning to school, or to any person with whom he is placed out on license, or to the person to whose custody he is committed under this Act, a youthful offender, young person or child who has so escaped, or knowingly assists in so doing;

shall be liable to imprisonment for a term which may extend to two months or to a fine not exceeding two hundred rupees, or to both.

Discharge and transfer.

36. (1) The Local Government may, at any time, order a youthful offender or a child to be discharged from a reformatory or industrial school either absolutely or on such conditions as the Local Government approve.

(2) The Local Government may order—

(a) a youthful offender or child to be transferred from one reformatory school to another, or from one industrial school to another;

(b) a youthful offender under the age of fourteen years detained in a reformatory school to be transferred to an industrial school;

(c) a young person detained in an industrial school, who is found to be exercising an evil influence over the other inmates of the school or who is guilty of a serious breach of the rules of the school or of escaping from the school, to be transferred to a reformatory school:

Provided that the whole period of the detention of the youthful offender, young person or child shall not be increased by the transfer.

CHAPTER VI.

Miscellaneous.

Juvenile Courts.

37. (1) The Local Government may provide for the establishment for any district or other local area of one or more separate Courts for the hearing of charges against children or young persons or of applications for orders or licenses relating to a child or young person at which the attendance of the child or young person is required.

(2) Where no such separate Court has been established, the Court before which a child or young person is brought shall, unless the child or young person is charged jointly with any other person not being a child or young person, whenever practicable, sit either in a different building or room from that in which the ordinary sittings of the Court are held or on different days or at different times from those at which the ordinary sittings are held.

(3) Notwithstanding any thing contained in the Code of Criminal Procedure, 1898, a Juvenile Court established for the suburbs of Calcutta as defined by notification under section 1 of the Calcutta Suburban Police Act, 1866, or a Magistrate of the District of 24-Pargannas exercising powers under this Act may inquire into and try in such place within Calcutta as the Local Government may direct the case of any child or young person who is accused of committing any offence within those suburbs, and such inquiry or trial shall for the purposes of jurisdiction be deemed to be held in the suburbs of Calcutta as so defined.

Any such accused may be detained, pending trial or on conviction, in any place in Calcutta, which is set apart, under the provisions of this Act or the rules made thereunder, for the reception of children or young persons.

Presumption and determination of age.

38. (1) Whenever a person, whether charged with an offence or not, is brought before any criminal Court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or young person, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age as nearly as may be.

(2) An order or judgment of the Court shall not be invalidated by any subsequent proof that the age of such person has not been correctly stated by the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person and, where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, the person shall for the purposes of this Act be deemed not to be a child or young person.

Provision as to religious persuasion

39. (1) In determining the reformatory or industrial school to which a youthful offender or child is to be sent under this Act, the Court shall endeavour to ascertain the religious persuasion to which the youthful offender or child belongs and shall, if possible, select a school in which facilities are afforded for instruction in his religion, and shall pass an order to that effect.

(2) Where a child or young person is committed to suitable custody under this Act, the Court in determining the person to whose custody the child or young person shall be committed shall endeavour in like manner to ascertain the religion of the child or young person and shall, if possible, select a person of the same religion, or a person who gives such undertaking as seems to the Court sufficient that the child or young person shall be brought up in accordance with the religion of such child or young person, and shall pass an order to that effect.

(3) Where under section 32 or section 33 a child or a youthful offender is boarded out or is permitted by license to live with any other person, the manager of the school shall select for this purpose a person of the same religion as the child or youthful offender, or a person who gives a satisfactory undertaking that the child or the youthful

offender shall be brought up in accordance with the religion of such child or youthful offender.

Penalty for cruelty to child or young person.

40. If any person over the age of sixteen years, who has the custody, charge or care of any child or young person, assaults, ill-treats, neglects, abandons or exposes such child or young person, or causes such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight or hearing or limb or organ of the body, and any mental derangement), that person shall be punishable with imprisonment for a term not exceeding two years or with fine not exceeding two hundred rupees, or with both.

Penalty for causing, encouraging or abetting seduction or prostitution of young girl.

41. If any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages or abets the seduction or prostitution of that girl, he shall be punishable with imprisonment for a term not exceeding two years.

Penalty for taking pawn from a child.

42. If a pawn-broker takes an article in pawn from any child, whether offered by that child on his own behalf or on behalf of any other person, he shall be punishable with fine not exceeding one hundred rupees.

Authority of persons having custody of child or young person

43. Notwithstanding anything contained in any other law, any person to whose custody a child or young person is committed under the provisions of this Act shall, while the order is in force, have the like control over the child or young person as if he were his parent, and shall be responsible for his maintenance and protection, and the child or young person shall continue in his custody notwithstanding that he is claimed by his parent or any other person.

Custody of youthful offenders, young persons and children in places of detention.

44. (1) A copy or the order or judgment, in pursuance of which a youthful offender, young person or child is committed to custody in a place of detention provided under this Act, shall be delivered with him to the person in charge of the place of detention, and shall be a sufficient authority for his detention in that place in accordance with the terms thereof.

(2) Any such person shall, during such detention and whilst being conveyed to and from the place of detention be deemed to be in legal custody, and if he escapes, may

be arrested without a warrant and be brought back to the place of detention where he was detained.

Inspection of institutions for poor children.

45. (1) The Local Government may cause any institution for the reception of poor children or young persons supported wholly or partly by voluntary contributions, and not liable to be inspected by or under the authority of the Government, to be visited and inspected from time to time by persons appointed by the Local Government for the purpose.

(2) Any person so appointed shall have power to enter the institution and to make a complete inspection thereof and of all papers, registers, and accounts relating thereto.

(3) Whoever obstructs any person appointed under sub-section (1) in the discharge of his duties, or refuses or wilfully neglects to furnish him with the necessary means of making any entry or inspection, shall be punishable with fine which may extend to fifty rupees.

Procedure in respect of bonds.

46. The provisions of Chapter XLII of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to bonds taken under this Act.

Removal of disqualification attaching to convictions of offences.

47. Notwithstanding anything contained in any other law, the conviction of a child or young person shall not be regarded as a disqualification attaching to a conviction of an offence under such law.

Rules.

48. (1) The Local Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Local Government may make rules—

(a) for the establishment, certification and maintenance of reformatory and industrial schools and auxiliary homes;

(b) for the inspection of reformatory and industrial schools and auxiliary homes and prescribing the powers and duties of the chief inspector, and other inspectors;

(c) prescribing the powers and duties of the managers of reformatory and industrial schools;

(d) regulating the choice of a school;

(e) for the boarding out, licensing and supervision of children and young persons;

(*f*) for the contribution by parents and other persons liable to maintain children and young persons;

(*g*) regulating the disposal and after-care of the inmates of reformatory and industial schools and for the appointment of visitors and their tenure of office;

(*h*) for the management of reformatory and industrial schools and auxiliary homes;

(*i*) for the education and industrial and moral training of the inmates of reformatory and industrial schools and for the credit to them of a portion of the proceeds of their work;

(*j*) for the conveyance of youthful offenders and children to reformatory and industrial schools;

(*k*) prescribing visits to and communication with the inmates of reformatory and industrial schools;

(*l*) for the grant of permssion to the inmates of reformatory and industrial schools to absent themseives for short periods;

(*m*) prescribing the punishment of offences committed by the inmates of reformatory and industrial schools;

(*n*) prescribing the manner in which a child or young person may be committed to suitable custody and for the supervision of such children and young persons;

(*o*) for the detention of children and young persons under arrest or remanded or committed for trial; and

(*p*) prescribing the procedure to be adopted in Juvenile Courts.

(3) All rules made under clauses (*o*) and (*p*) of sub-section (2) shall be subject to the previous approval of the Governor-General in Council.

(4) All rules made under this section shall be published in the *Calcutta Gazette* and, on such publication, shall have the same effect as if enacted in this Act.

Appeal.

49. (1) An appeal from an order made by a Court under sections 25, 27, 31 or 39 shall lie,—

(*a*) if passed by a Magistrate other than a District Magistrate or a Presidency Magistrate, to the District Magistrate;

(*b*) if passed by a District Magistrate, to the Court of Session;

(c) if passed by a Court of Sessions or Court of an Additional Sessions Judge or of an Assistant Sessions Judge or by a Presidency Magistrate, to the High Court.

(2) No appeal shall lie from any order passed in any such appeal.

Revision

50. Any order passed under the provisions of this Act and not otherwise provided for may be revised by the High Court either on the report of a Sessions Judge or of a District Magistrate, or on the application of a party interested, or on its own initiative.

THE GOONDAS ACT, I of 1923 B. C.

An Act to provide for the control of certain goondas residing in, or frequenting Calcutta or the neighbourhood of Calcutta, and for their removal elsewhere.

WHEREAS it is expedient to provide for the control of certain goondas within Calcutta and the neighbourhood of Calcutta and to provide for their removal elsewhere in certain circumstances;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

Short title and local extent.

1. (1) This Act may be called the Goondas Act, 1923.

(2) It extends to the whole of Bengal.

Definitions.

2. In this Act—

(1) "Bengal" means the Presidency of Bengal, as constituted on the first day of April, 1912;

(2) "Calcutta" means the town of Calcutta as defined in section 3 of the Calcutta Police Act, 1866, together with the suburbs of Calcutta as defined by notification under section 1 of the Calcutta Suburban Police Act, 1866, and the Port of Calcutta as defined by notification under section 5 of the Indian Ports Act, 1908;

(3) "Commissioner of Police" means the officer vested with the administration of police in Calcutta under the Calcutta Police Act, 1866, the Calcutta Suburban Police Act, 1866, the Calcutta Port Act, 1890, and any Act amending any of these Acts;

(4) "goonda" includes a hooligan or other rough;

(5) "neighbourhood of Calcutta" means the areas included in—

(a) the police-stations of Baranagore, Nawapara, Barrackpore, Dum-Dum, Tollyganj, Behala, Metiabruz, Maheshtolla, Bhangore, Tittaghar, Khardah and Budge-Budge in the district of the 24-Parganas;

(b) the police-stations of Howrah, Sibpore, Malipanchghora, Golabaree, Liloosh, Bally and Bantra in the district of Howrah; and

(c) any other area which is included within the districts of the 24-Parganas, Howrah or Hooghly, and which the Local Government by notification in the *Calcutta Gazette* may include within this definition;

(6) "Presidency area" means Calcutta together with that portion of the district of the 24-Parganas which is not included in Calcutta as defined in this section, and the districts of Howrah and Hooghly.

Report by Commissioner of Police or District Magistrate.

3. (1) Whenever it shall appear to the Commissioner of Police that any person—

(a) is a goonda, or a member of a gang or body of goondas, and

(b) is residing within or habitually visiting or frequenting Calcutta,

and that such person or that such gang or body is committing or has committed or is about to commit or is assisting or abetting the commission of—

(i) a non-bailable offence against person or property, or

(ii) the offence of criminal intimidation, or

(iii) an offence involving a breach of the peace,

so as to be a danger to, or cause, or to be likely to cause, alarm to, the inhabitants or to any section of the inhabitants of Calcutta, the Commissioner of Police shall make a report to the Local Government with a recommendation that such person or gang or body of persons be dealt with under the provisions of this Act.

(2) The same powers and duties as are conferred and imposed by sub-section (1) on the Commissioner of Police in respect of persons or gangs or bodies of persons residing in, or habitually frequenting Calcutta, are conferred and imposed on the District Magistrate having jurisdiction

in any local area, which is outside Calcutta but is included in the neighbourhood of Calcutta, in respect of all persons or gangs or bodies of persons residing within or habitually visiting or frequenting such area, who appear to such District Magistrate to be goondas or members of a gang of goondas and to be committing, or to have committed or to be about to commit, or to be assisting or abetting the commission of, any of the offences set forth in clause (*i*), (*ii*) or (*iii*) of sub-section (*1*) so as to be a danger to, or to cause or to be likely to cause, alarm to, the inhabitants or to any section of the inhabitants of such area.

Issue of warrant on receipt of report.

4. (*1*) On receipt of the report of the Commissioner of Police or of the District Magistrate, as the case may be, the Local Government may make an order for the issue of a warrant for the arrest of the person against whom the report has been made.

(*2*) The warrant shall be in such a form as shall be prescribed by the Local Government by notification in the *Calcutta Gazette* and shall be issued by a Secretary to the Local Government and shall contain a statement of the heads of the charges made against such person in the report, and shall further require such person to submit by petition to the advising Judges appointed under sub-section (*1*) of section 5 by such date as may be specified in the warrant any representation that he may desire to make.

(*3*) The officer by whom such warrant is issued shall have—

(*i*) for the enforcement of the attendance of the person, against whom the warrant is issued, at such place and at such time or times as may be specified therein (and thereafter as such officer may direct) in order to communicate to such person the final order of the Local Government made under section 6, and

(*ii*) for the forfeiture, under section 514 of the Code of Criminal Procedure, 1898, of any bond, executed for the attendance of such person at such place and at such time or times,

all the powers of a Presidency Magistrate under the Code of Criminal Procedure, 1898; and the warrant shall for the purposes set forth in clauses (*i*) and (*ii*) be deemed to be a warrant issued by a Presidency Magistrate, for the arrest of such person to answer a charge in respect of a bailable offence committed by him within the jurisdiction of such Magistrate, and such person, in default of sufficient security

being furnished, may, unless such officer otherwise directs, be detained in custody until the final order of the Local Government under section 6 is communicated to him.

Local Government to place report before advising Judges.

5. (1) After issue of the warrant under section 4, the Local Government shall forthwith cause the report of the Commissioner of Police or of the District Magistrate, as the case may be, with all material facts and circumstances in their possession relevant to the same to be placed before two advising Judges, of whom one shall be a District and Sessions Judge of Alipore and the other a District and Sessions Judge who has served as such for a period of not less than five years.

(2) The advising Judges shall consider in camera the report and the other facts and circumstances, if any, adduced before them by the Local Government, and any representation, submitted to them by the person against whom the report has been made within the time fixed by section 4 or such further time as they may allow, and shall call for such further information, if any, and may examine such witnesses, if any, as shall appear to them to be necessary to enable them to tender their advice on the report. They shall also give to the person against whom the report has been made, if he so desires, an opportunity of appearing in person before them to offer his explanation, and may at the instance of that person require the attendance of any other person, whose statement may support that explanation:

Provided that—

(a) nothing in this section shall be deemed to entitle the person whose case is before the advising Judges to appear or be represented before them by pleader, nor shall the Local Government be so entitled.

(b) the advising Judges shall not disclose to the person in question any fact the communication of which might endanger the safety of any individual, and

(c) the advising Judges shall not be bound to observe the rules of evidence and shall not permit the putting of any question which may endanger the safety of any individual.

(3) Any statement made to the advising Judges by any person other than the person whose case is before them shall be deemed to be information given to a public servant within the meaning of section 182 of the Indian Penal

Code, and the advising Judges shall for the purpose of securing the attendance of any person under the provisions of sub-section (2) have all the powers of a District Magistrate under the Code of Criminal Procedure, 1898.

(4) When the advising Judges have reached their conclusions, they shall report the same in writing to the Local Government.

(5) If the person whose case is under their consideration claims, when submitting his representation or when appearing before the advising Judges, that both he and his father were born in Bengal or that he is a member of a family which has definitely settled in Bengal and is himself so settled the advising Judges shall give him an opportunity of establishing his claim, and shall also give to the Commissioner of Police or the District Magistrate, as the case may be, an opportunity of rebutting the same, and at the time of submission of their report to the Local Government shall record their opinion as to whether such person has established his claim.

Order of removal by Local Government.

6. (1) On receipt of the report of the advising Judges the Local Government, if satisfied that the person against whom the report has been made should be removed elsewhere, may by an order reciting the conclusions of the advising Judges, as reported by those Judges—

(a) direct him to leave Bengal within such time, by such route or routes, and for such period as may be stated in the order, or

(b) where the Local Government are satisfied that both he and his father were born in Bengal, or that he is a member of a family which has definitely settled in Bengal and is himself so settled, direct him to leave the Presidency area within such time, by such route and for such period as may be stated in the order, and may in that case further order that he shall during the same period notify his place of residence and any change or intended change of residence and any absence or intended absence from his residence to the officer appointed by the Local Government in this behalf.

(2) The order of the Local Government under sub-section (1) shall be final, and shall not be called in question in any subsequent proceeding under section 9 or section 10.

Evasion of orders.

7. Where any person on whom a warrant has been served under section 4—

(*i*) fails to attend at the place and at the time or times specified in the warrant and thereafter when required in order to receive the order of the Local Government under section 6, or

(*ii*) prior to the issue of that order, leaves Bengal or the Presidency area, as the case may be,

the Local Government may issue the order under section 6 in the absence of that person by publishing the same in the *Calcutta Gazette*, and such person shall be deemed to have absconded in order to evade that order:

Provided that the Local Government may condone a failure to attend under clause (*i*), on reasons for such non-attendance being furnished to their satisfaction, and in that case such person shall not be deemed to have absconded in order to evade the order.

Identification order.

8. Every person, in respect of whom an order has been made under section 6 shall, if so directed by the Commissioner of Police or the District Magistrate, as the case may be,—

(*i*) present himself to be photographed;

(*ii*) allow his finger impressions to be recorded;

(*iii*) if literate, furnish such officer with specimens of his handwriting and signature; and

(*iv*) attend at such times and places as the Commissioner of Police or the District Magistrate, as the case may be, may direct for all or any of the aforesaid purposes.

Penalty for breach of order under section 6.

9. When any person, against whom an order has been made under section 6, fails to comply with such order within the time specified therein, or after complying with the said order returns to, or after evading the said order returns to or remains in, any place within Bengal or the Presidency area, as the case may be, before the expiry of the period stated in the order, or fails to give to the officer appointed to receive it the information in regard to residence or absence set forth in section 6, such person may be arrested without a warrant by a police-officer and shall be liable, on conviction before a Presidency Magistrate, or a Magistrate of the first class, to be punished with rigorous imprisonment for a term which may extend to one year.

Penalty for breach of order under section 8 or for absconding to evade an order under section 6.

10. (1) Any person who fails to comply with, or attempts to evade, any direction given in accordance with the provisions of section 8, or who absconds in order to evade any order made under section 6 shall be liable to be arrested without a warrant and shall, on conviction before a Presidency Magistrate, or a Magistrate of the first class, be liable to be punished with imprisonment for a term which may extend to six months, or to a fine which may extend to one thousand rupees, or to both.

(2) An offence under this section and under section 9 shall be deemed to be a non-bailable offence.

THE CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (XIII of 1923).

An Act for the suppression of Immoral Traffic in the town and suburbs of Calcutta and in the Port of Calcutta.

Whereas it is expedient to make better provision for the suppresson of brothels, of the traffic in women and girls and for other purposes of a like nature in the town and suburbs of Calcutta and in the Port of Calcutta;

And whereas the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

Short title, commencement and extent.

1. (1) This Act may be called the Calcutta Suppression of Immoral Traffic Act, 1923.

(2) It shall come into force on such date as the Local Government may, by notification in the *Calcutta Gazette*, direct.

(3) It extends to Calcutta as defined in section 2.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "brothel" means any house, room or place which the occupier or person in charge thereof habitually allows to be used by any other person for the purposes of prostitution;

(2) "Calcutta" means the town of Calcutta as defined in section 3 of the Calcutta Police Act, 1866, the suburbs of Calcutta as defined by notification under section 1 of the Calcutta Suburban Police Act, 1866, and the Port of Calcutta as defined by notification under section 5 of the Indian Ports Act, 1908;

(3) "Commissioner of Police" means the Commissioner of Police for the town and suburbs of Calcutta;

(4) the words "public place" and "street" have the meanings assigned to them by section 3 of the Calcutta Police Act, 1866;

(5) "prescribed" means prescribed by rules made under section 13.

Power to order discontinuance of house, etc., as brothel, etc.

3. (1) When the Commissioner of Police receives information that any house, room or place—

(a) is being used as a brothel or disorderly house, or for the purpose of carrying on the business of a common prostitute, in the vicinity of any educational institution or of any boarding house, hostel or mess used or occupied by students, or of any place of public worship or recreation, or

(b) is used as, or for the purpose, aforesaid to the annoyance of respectable inhabitants of the vicinity, or

(c) is used as, or for the purpose, aforesaid on any main thoroughfare which has been notified in this behalf by the Local Government on the recommendation of the Corporation of Calcutta, or

(d) is used as a common place of assignation,

he may cause a notice to be served on the owner, lessor, manager, lessee, tenant or occupier of the house, room or place or all of them, to appear before him either in person or by agent, on a date to be fixed in such notice, and to show cause why, on the grounds to be stated in the notice, an order should not be made for the discontinuance of such use of such house, room or place.

(2) If, on the date fixed, or on any subsequent date to which the hearing may be adjourned, the Commissioner of Police is satisfied, after making such inquiry as he deems fit, that the house, room or place is used as described in clause (a), (b), (c) or (d) of sub-section (1), as the case may be, he may direct, by order in writing on such owner, lessor, manager, lessee, tenant or occupier, that the use as so described of the house, room or place be discontinued from the date not less than fifteen days from the date of the said order and be not thereafter resumed

(3) No house, room or place, concerning which an order has been made under sub-section (2), shall again

be used, or be allowed to be used, in any manner described in clause (*a*), (*b*), (*c*) or (*d*) of sub-section (*1*), as the case may be, and the Commissioner of Police, if he is satisfied, with or without further inquiry, that such house, room or place is again used in such manner, may, by order in writing on the owner, lessor, manager, lessee, tenant or occupier of such house, room or place, direct that the use as so described of such house, room or place be discontinued within a period of seven days and be not thereafter resumed.

(*4*) For the purposes of this section the decision of the Commissioner of Police that a house, room or place is used in any manner, or for any purpose, described in clause (*a*), (*b*), (*c*) or (*d*) of sub-section (*1*) shall be final, and the legality or propriety thereof shall not be questioned in any trial or judicial proceeding in any Court.

(*5*) Whoever, after an order has been made by the Commissioner of Police under sub-section (*2*) or sub-section (*3*) in respect of any house, room or place, uses, or allows to be used, such house, room or place in a manner which contravenes such order after the period stated therein, shall be punished with fine which may extend to fifty rupees for every day after the expiration of the said period during which the breach continues, and shall, on a second conviction for the same offence, be punished with imprisonment for a term which may extend to six months in addition to, or in lieu of, any fine imposed.

(*6*) For the purpose of an inquiry under this section the Commissioner of Police may depute a Deputy Commissioner of Police to make a local investigation, and may take into consideration his report thereon.

(*7*) The Commissioner of Police shall maintain a register in which shall be entered a description of all houses, rooms and places in respect of which an order has been made under this section. Such register shall be open to inspection by the public on payment of the prescribed fee.

(*8*) Notwithstanding anything contained in any other law for the time being in force, the owner or lessor of any house, room or place, in respect of which an order has been made on the lessee, tenant or occupier thereof directing the discontinuance of the use thereof as a brothel or disorderly house or for the purpose of carrying on the business of a common prostitute, or as a common place

of assignation, shall be entitled forthwith to determine such lease, tenancy or occupation.

Removal and disposal of minor girls found in brothels, etc.

4. (1) The Commissioner of Police, or a Deputy Commissioner of Police, or a police-officer not below the rank of Inspector, specially authorised in writing in this behalf by the Commissioner or a Deputy Commissioner of Police, shall have power to enter into any brothel or disorderly house or house of assignation, in which he has knowledge or suspicion, or has reason to believe from a report made to him that a girl, apparently under the age of sixteen years, is living or is carrying on, or is being made to carry on, the business of a prostitute, and shall be entitled to remove such girl forthwith from such brothel, disorderly house or house of assignation.

(2) A girl who has been so removed shall be brought before a Juvenile Court constituted under section 37 of the Bengal Children Act, 1922, and the Court shall cause an inquiry to be made in the manner provided in sub-section (3) of section 27 of that Act and, if satisfied that the girl is under sixteen years of age and that she should be dealt with as hereinafter provided, may make an order that such girl be placed in suitable custody in the prescribed manner until she attains the age of eighteen years or for any shorter period.

(3) For the determination whether a girl produced before a Court under the provisions of this section is under sixteen years of age, the provisions of section 38 of the Bengal Children Act, 1922, shall apply.

Intermediate custody of girl removed from brothels, etc.

5. When a girl has been removed from a brothel or disorderly house or house of assignation under the provisions of sub-section (1) of section 4, the Commissioner or Deputy Commissioner of Police or other police-officer carrying out the removal shall, until such girl can be brought before the Court, and until the Court makes an order under sub-section (2) of section 4 or otherwise disposes of the case, cause her to be detained in such place (other than a police-station or jail) as may be prescribed in this behalf by the Local Government.

Punishment for living on the earnings of prostitution.

6. (1) Any male person who knowingly lives, wholly or in part, on the earnings of prostitution shall be punished with imprisonment which may extend to three years, or with whipping, or with both of these punishments and shall also be liable to a fine which may extend to one thousand rupees.

(2) Where a male person is proved—

(i) to be living with, or to be habitually in the company of, a prostitute, or

(ii) to have exercised control, direction or influence over the movements of a prostitute,

in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally, it shall be presumed, until the contrary is proved, that he is knowingly living on the earnings of prostitution.

Procuration.

7. Any person who induces a woman or girl to go from any place with intent that she may, for the purposes of prostitution, become the inmate of, or frequent, a brothel, shall be punished with imprisonment which may extend to three years, or (if a male) with whipping or (if a male) with both of these punishments, and shall also be liable to fine which may extend to one thousand rupees.

Punishment for importing woman or girl for prostitution.

8. Any person who brings or attempts to bring, or causes to be brought, into Calcutta any woman or girl with a view to her carrying on, or being brought up to carry on, the business of a prostitute, shall be punished with imprisonment which may extend to three years, or (if a male) with whipping, or (if a male) with both of these punishments and shall also be liable to fine which may extend to one thousand rupees.

Detention as prostitute or in brothels, etc.

9. Any person who detains any woman or girl against her will—

(a) in any house, room or place in which the business of a prostitute is carried on, or

(b) in or upon any premises with intent that she may have sexual intercourse with any man other than her lawful husband,

shall be punished with imprisonment which may extend to three years, or with fine which may extend to one thousand rupees or with both.

Offences triable by Presidency Magistrates or First Class Magistrates.

10. No Magistrate other than a Presidency Magistrate or a Magistrate of the first class shall try offences punishable under sections 6, 7, 8 and 9.

11. Sections 43, 43A and 43B of the Calcutta Police Act, 1866, and sections 17, 17A and 17B of the Calcutta Suburban Police Act, 1866, are hereby repealed.

Subsequent treatment of girl committed to suitable custody under sub-section (2) of section 4.

12. When an order that a girl be placed in suitable custody has been passed under sub-section (2) of section 4, the provisions of the Bengal Children Act, 1922, shall, subject to such modifications as the Local Government may prescribe by rules made under section 13 and notwithstanding her age, thereafter apply to the case of such girl during the period of the said order, as if she had been a child or young person dealt with under section 28 of that Act.

Rules

13. The Local Government may make rules—

(a) prescribing the fee to be paid for inspection of the register maintained under sub-section (7) of section 3;

(b) for the care, treatment, instruction and maintenance of girls placed in suitable custody under sub-section (2) of section 4; and

(c) prescribing the places in which girls may be detained under the provisions of section 5.

THE BENGAL CRIMINAL LAW AMENDMENT ACT, 1925.

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THE BENGAL CRIMINAL LAW AMENDMENT ACT, 1925.

[Made by the Governor of Bengal under the provisions of section 72E of the Government of India Act. Received the assent of His Majesty signified by an order of His Majesty in Council, which assent was notified by the Governor General in the Gazette of India, dated the 21st March, 1925.]

An Act to supplement the ordinary criminal law in Bengal.

Preamble.

WHEREAS it is expedient to supplement the ordinary criminal law in Bengal;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

Short title, commencement, extent and duration.

1. (1) This Act may be called the Bengal Criminal Law Amendment Act, 1925;

(2) It shall come into force on such date as the Local Government may, by notification in the *Calcutta Gazette*, direct;

(3) It extends to the whole of Bengal; and

(4) It shall continue in force for five years from the date of its commencement.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context, "the Code" means the Code of Criminal Procedure, 1898.

Power of Local Government to direct trial by Commissioners in certain cases.

3. (1) The Local Government may, by order in writing, direct that any person accused of any offence specified in the First Schedule shall be tried by Commissioners appointed under this Act.

(2) No order under sub-section (1) shall be made in respect of, or be deemed to include, any person who has been committed under the Code for trial before a High Court, but save as aforesaid an order under that sub-section may be made in respect of, or may include, any person accused of any offence specified in the First Schedule whether such offence was committed before or after the commencement of this Act.

Appointment and qualification of Commissioners.

4. (1) Commissioners for the trial of persons under this Act shall be appointed by the Local Government.

(2) Such Commissioners may be appointed for the whole of Bengal or for any part thereof, or for the trial of any particular accused person or persons.

(3) All trials under this Act shall be held by three Commissioners, of whom at least two shall be persons who at the time of appointment under this section are serving as, and have for at least three years served as or exercised the powers of, Sessions Judges or Additional Sessions Judges, or are persons qualified under sub-section (3) of section 101 of the Government of India Act, for appointment as Judges of a High Court.

Procedure of Commissioners.

5. (1) Commissioners appointed under this Act may take cognisance of offences without the accused being committed to them for trial, and in trying accused persons, shall record evidence in the manner prescribed in section 356 of the Code and shall, in other respects also, subject to this Act and to any rules made thereunder, follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates.

(2) In the event of any difference of opinion among the Commissioners, the opinion of the majority shall prevail.

Powers of Commissioners.

6. (1) The Commissioners may pass upon any person convicted by them any sentence authorised by law for the punishment of the offence of which such person is convicted.

(2) If in any trial under this Act it is found that the accused person has committed any offence, whether such offence is or is not an offence specified in the First Schedule, the Commissioners may convict such person of such offence and pass any sentence authorised by law for the punishment thereof.

Application of Code of Criminal Procedure to proceedings of Commissioners.

7. The provisions of the Code, so far only as they are not inconsistent with the provisions of, or the special procedure prescribed by or under, this Act shall apply to the proceedings of Commissioners appointed under this Act, and such Commissioners shall have all the powers conferred by the Code on a Court of Sessions exercising original jurisdiction.

Tender of pardon.

8. (1) Commissioners trying an offence under this Act may, with a view to obtaining the evidence of any person supposed to have been directly concerned in, or privy to, the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor in the commission thereof.

(2) Where, in the case of any offence for the trial of which by Commissioners an order has been made under

sub-section (1) of section 3, a pardon has, before the passing of such order, been tendered to and accepted by any person under section 337 of the Code, the provisions of sub-sections (2) and (3) of that section of the Code shall apply as if the accused person had been committed for trial to the Commissioners.

(3) For the purposes of sections 339 and 339A of the Code pardons tendered under sub-section (1) and sub-section (2) shall be deemed respectively to have been tendered under sections 338 and 337 of the Code.

Special rule of evidence.

9. Notwithstanding anything contained in the Indian Evidence Act, 1872, when the statement of any person has been recorded by any Magistrate, such statement may be admitted in evidence in any trial before Commissioners appointed under this Act if such person is dead or cannot be found or is incapable of giving evidence, and the Commissioners are of opinion that such death, disappearance, or incapacity has been caused in the interests of the accused.

Rule-making powers of Local Government.

10. The Local Government may, by notification in the *Calcutta Gazette*, make rules consistent with this Act to provide for all or any of the following matters, namely:—

(*i*) the times and places at which Commissioners appointed under this Act may sit;

(*ii*) the procedure of such Commissioners, including the appointment and powers of their President, and the procedure to be adopted in the event of any Commissioner being prevented from attending throughout the trial of any accused person;

(*iii*) the conduct of and the procedure at trials, the manner in which prosecutions before such Commissioners shall be conducted and the appointment and powers of persons conducting such prosecutions;

(*iv*) the execution of sentences passed by such Commissioners;

(*v*) the temporary custody or release on bail of persons referred to or included in any order made under sub-section (1) of section 3, and the transmission of records to the Commissioners; and

(*vi*) any matter which appears to the Local Government to be necessary for carrying into effect the provisions of this Act relating or ancillary to trials before Commissioners.

Power of Local Government to deal with certain suspects.

11. (1) Where, in the opinion of the Local Government, there are reasonable grounds for believing that any person—

(i) has acted, is acting or is about to act in contravention of the provisions of the Indian Arms Act, 1878, or of the Explosive Substances Act, 1908; or

(ii) has committed, is committing or is about to commit any offence specified in the Second Schedule; or

(iii) has acted, is acting or is about to act with a view to interfere by violence or by threat of violence with the administration of justice;

the Local Government, if it is satisfied that such person is a member, or is being controlled or instigated by a member, of any association of which the objects or methods include the doing of any of such acts or the commission of any of such offences, may, by order in writing, give all or any of the following directions, namely, that such person—

(a) shall notify his residence and any change of residence to such authority as may be specified in the order;

(b) shall report himself to the police in such manner and at such periods as may be so specified;

(c) shall conduct himself in such manner or abstain from such acts as may be so specified;

(d) shall reside or remain in any area so specified;

(e) shall not enter, reside in, or remain in any area so specified;

(f) shall be committed to custody in jail;

and may at any time add to, amend, vary or rescind any order made under this section:

Provided that such order shall be reviewed by the Local Government at the end of one year from the date of the making of the order, and shall not remain in force for more than one year unless upon such review the Local Government directs its continuance.

(2) The Local Government in its order under sub-section (1) may direct—

(a) the arrest without warrant of the person in respect of whom the order is made at any place where he may be found by any police officer or by any officer of Government to whom the order may be directed or endorsed by or under the

general or special authority of the Local Government;

(b) the search of any place specified in the order which in the opinion of the Local Government has been, is being, or is about to be used by such person, for the purpose for doing any act, or committing any offence, of the nature described in sub-section (1).

Service of orders under section 11.

12. An order made under sub-section (1) of section 11 shall be served on the person in respect of whom it is made in the manner provided in the Code for service of a summons, and upon such service such person shall be deemed to have had due notice thereof.

Power to arrest without warrant.

13. (1) Any officer of Government authorised in this behalf by general or special order of the Local Government may arrest without warrant any person against whom a reasonable suspicion exists that he is a person in respect of whom an order might lawfully be made under sub-section (1) of section 11.

(2) Any officer exercising the power conferred by sub-section (1) may, at the time of making the arrest, search any place and seize any property which is, or is reasonably suspected of being, used by such person for the purpose of doing any act, or committing any offence, of the nature described in sub-section (1) of section 11.

(3) Any officer making an arrest under sub-section (1) shall forthwith report the fact to the Local Government, and may, by order in writing, commit any person so arrested to custody pending receipt of the orders of the Local Government; and the Local Government may by general or special order specify the custody to which such person shall be committed:

Provided that no person shall be detained in custody under this section for a period exceeding fifteen days save under a special order of the Local Government, and no person shall in any case be detained in custody under this section for a period exceeding one month.

Enforcement of orders.

14. (1) The Local Government and every officer of Government to whom any copy of any order made under section 11 has been directed or endorsed by or under the general or special authority of the Local Government may use any and every means necessary to enforce compliance with such order.

(2) Any officer exercising any of the powers conferred by section 13 may use any and every means necessary to the full exercise of such powers.

Penalty for breach of order under section 11.

15. Whoever, being a person in respect of whom an order has been made under sub-section (1) of section 11 knowingly disobeys any direction in such order, shall be punishable with imprisonment for a term which may extend to three years, and shall also be liabe to fine.

Power of photographing, etc. persons in respect of whom order has been made under section 11.

16. (1) Every person in respect of whom an order has been made under sub-section (1) of section 11 shall, if so directed by any officer authorised in this behalf by general or special order of the Local Government,—

(a) permit himself to be photographed:

(b) allow his finger impressions to be taken;

(c) furnish such officer with specimens of his handwriting and signature;

(d) attend at such times and places as such officer may direct for all or any of the foregoing purposes.

(2) If any person fails to comply with or attempts to avoid any direction given in accordance with the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Powers of search.

17. The power to issue search warrants conferred by section 98 of the Code shall be deemed to include a power to issue warrants authorising the search of any place in which any Magistrate mentioned in that section has reason to believe that any offence specified in the First Schedule has been, is being, or is about to be committed, and the seizure of anything found therein or thereon which the officer executing the warrant has reason to believe has been, is being, or is intended to be, used for the commission of any such offence; and the provisions of the Code, so far as they can be made applicable, shall apply to searches made under the authority of any warrant issued under this section, and to the disposal of any property seized in any such search; and an order for search issued by the Local Government under sub-section (2) of section 11 shall be deemed to be a search warrant issued by a Presidency Magistrate or the District Magistrate having jurisdiction in the place specified therein, and may be executed by the person to whom the order is addressed in the manner provided in this section

Scrutiny of case by two Judges.

18. (1) Within one month from the date of an order by the Local Government under sub-section (1) of section 11, the Local Government shall place before two persons, who shall be either Sessions Judges or Additional Sessions Judges having, in either case, exercised for at least five years the powers of a Sessions Judge, or Additional Sessions Judge, the material facts and circumstances in its possession on which the order has been based or which are relevant to the inquiry, together with any such facts and circumstances relating to the case which may have subsequently come into its possession, and a statement of the allegations against the person in respect of whom the order has been made and his answers to them, if furnished by him. The said Judges shall consider the said material facts and circumstances and the allegations and answers and shall report to the Local Government whether or not in their opinion there is lawful and sufficient cause for the order.

(2) On receipt of the said report, the Local Government shall consider the same and shall pass such order thereon as appears to the Local Government to be just or proper.

(3) Nothing in this section shall entitle any person against whom an order has been made under sub-section (1) of section 11 to attend in person or to appear by pleader in any matter connected with the reference to the said Judges, and the proceedings and report of the said Judges shall be confidential.

Power to suspend operation of orders under section 11.

19. (1) When an order under sub-section (1) of section 11 has been made against a person, the Local Government may at any time, without conditions or upon any conditions which such person accepts, direct the suspension or cancellation of such order.

(2) If any condition on which an order has been suspended or cancelled is in the opinion of the Local Government not fulfilled, the Local Government may revoke the suspension or cancellation, and thereupon the person in whose favour such suspension or cancellation was made may, if at large, be arrested by any police officer without warrant, and the order under sub-section (1) of section 11 shall be deemed to be in full force.

(3) If the conditions on which such suspension or cancellation has been made include the execution of a bond with or without sureties, the Local Government may at once proceed to recover the penalty of such bond.

(4) A Presidency Magistrate or Magistrate of the first class shall in default of payment of such penalty issue, on application made in this behalf by an officer of the Local Government specially empowered, a warrant for the attachment and sale of the moveable property belonging to the defaulter or his estate if he be dead. On the issue of such warrant the provisions of sub-sections (3) and (4) of section 514 of the Code shall apply to such recovery.

Visiting Committees.

20. (1) The Local Government shall, by order in writing, appoint such persons at it thinks fit to constitute Visiting Committees for the purposes of this Act, and shall by rules prescribe the functions which these Committees shall exercise.

(2) Such rules shall provide for periodical visits to persons under restraint by reason of an order made under sub-section (1) of section 11.

(3) No person in respect of whom any such order has been made requiring him to notify his residence or change of residence or to report himself to the police or to abstain from any specified act, shall be deemed to be under restraint for the purpose of sub-section (2).

Allowances to persons under restraint and their dependants.

21. The Local Government shall make to every person, who is placed under restraint by reason of an order made under sub-section (1) of section 11, a monthly allowance for his support of such amount as is in the opinion of the Local Government, adequate for the supply of his wants, and shall also make to his family, if any, and to such of his near relatives, if any, as are in the opinion of the Local Government dependent on him for support, an allowance for the supply of their wants suitable in the opinion of the Local Government to their rank in life.

Explanation.—In this section the expression "under restraint" has the same meaning as in section 20.

Power to make rules

22. The Local Government may make rules providing for the procedure to be followed regarding the notification of residence and report to the police by persons in respect of whom orders have been made under section 11, and for the place and manner of custody of all persons arrested or committed to or detained in custody under this Act.

Publication of rules.

23. All rules made under this Act shall be published in the *Calcutta Gazette*, and on such publication shall have effect as if enacted in this Act.

Bar to suits, prosecutions and other legal proceedings.

24. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Effect of the Act.

25. Where, prior to the commencement of this Act, anything has been done, or any action has been taken under the provisions of the Bengal Criminal Law Amendment Ordinance, 1924, which thing or action might have been done or taken under the provisions herein enacted had this Act commenced on the 25th day of October, 1924, such thing or action shall be deemed to have been done or taken under the provisions of this Act, and every consequence which would have ensued if this Act had commenced as aforesaid, and such thing or action had been done or taken thereunder, shall thereupon ensue in all respects as if this Act had so commenced and such thing or action had been so done or taken.

THE FIRST SCHEDULE.

(See *sections 3 and 6.*)

Any of the following offences, if in the opinion of the Local Government there are reasonable grounds for believing that such offence has been committed by a member, or a person controlled or instigated by a member, of any association of which the objects or methods include the commission of any of such offences, namely:—

(*a*) any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 148, 302, 304, 326, 327, 329, 332, 333, 385, 386, 387, 392, 394, 395, 396, 397, 398, 399, 400, 401, 402, 431, 435, 436, 437, 438, 440, 454, 455, 457, 458, 459, 460 and 506;

(*b*) any offence under the Explosive Substances Act, 1908;

(*c*) any offence under the Indian Arms Act, 1878;

(*d*) any attempt or conspiracy to commit, or any abetment of, any of the above offences.

THE SECOND SCHEDULE.

(See *section 11.*)

(*1*) Any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 148,

302, 304, 326, 327, 329, 332, 333, 392, 394, 395, 396, 397, 398, 399, 400, 401, 402, 431, 435, 436, 437, 438, 440, 457 and 506.

(2) Any attempt or conspiracy to commit, or any abetment of, any of the above offences.

THE PRESIDENCY AREA (EMERGENCY) SECURITY ACT, III of 1926.

[Published in the Calcutta Gazette, Extraordinary, of the 25th May, 1926.]

Preamble.

WHEREAS it is expedient to make provision for the safeguarding of life and property in the Presidency Area in times of emergency;

AND WHEREAS the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent, commencement and duration.

1. (1) This Act may be called the Presidency Area (Emergency) Security Act, 1926.

(2) It extends to the Province of Bengal.

(3) (a) Section 4 shall come into force on the date or dates on which a state of emergency is declared under section 3 and shall continue in force for three months from such date or dates.

(b) The remainder of the Act shall come into force at once.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Calcutta" means the town of Calcutta as defined in section 3 of the Calcutta Police Act, 1866, together with the suburbs of Calcutta as defined by notification under section 1 of the Calcutta Suburban Police Act, 1866, and the port of Calcutta as defined by notification under section 5 of the Indian Ports Act, 1908.

(b) "Commissioner of Police" means the officer invested with the administration of the Police in Calcutta under the Calcutta Police Act, 1866, the Calcutta Suburban Police Act, 1866, and the Calcutta Port Act, 1890, and

(*c*) "Presidency Area" means Calcutta together with—

(*i*) the police stations of Barnagore, Nawapara, Barrackpore, Dum-Dum, Tollygunge, Behala, Metiabruz, Maheshtolla, Bhangore, Titagarh, Khardah and Budge-Budge in the district of the 24-Parganas;

(*ii*) the police stations of Howrah, Sibpore, Malipanchghora, Golabaree, Lilooah, Bally and Bantra in the district of Howrah; and

(*iii*) any other area within the 24-Parganas or the district of Howrah or Hooghly, which the Local Government by notification in the *Calcutta Gazette* may include within this definition.

Power to declare state of emergency.

3. The Local Government, if satisfied that the public tranquillity and security of life and property in the Presidency Area or any part thereof are endangered, may at any time, by notification in the *Calcutta Gazette*, declare that a state of emergency exists and shall set forth the reasons for such declaration in the notification.

Power to order removal of turbulent character.

4. (*1*) Whenever the Commissioner of Police or any District Magistrate exercising jurisdiction in the Presidency Area is satisfied that any person within his jurisdiction is committing or has committed or is likely to commit or is assisting or abetting the commission of—

(*a*) a non-bailable offence against any person or property, or

(*b*) the offence of criminal intimidation, or

(*c*) any offence involving a breach of the peace,

so as to be a danger to or cause or be likely to cause alarm to the inhabitants of the Presidency Area or any section thereof, the Commissioner of Police or the District Magistrate, as the case may be, may, subject to the control of the Local Government, by written order direct such person to remove himself from the Presidency Area within such time and by such route as may be specified in the order and not to return thereto for a period (not exceeding one year) to be specified in the order without the written permission of the Commissioner of Police or the District Magistrate, as the case may be.

(*2*) An order under sub-section (*1*) against any person may, unless the Commissioner of Police or the District Magistrate, as the case may be, is satisfied in respect of such person that both he and his father were born in Bengal or that he is a member of a family which has definitely

settled in Bengal and is himself so settled, direct that such person shall remove himself from Bengal within such time and by such route as may be specified in the order and shall not return thereto for a period (not exceeding one year) to be specified in the order save with the written permission of the Commissioner of Police or the District Magistrate, as the case may be.

(3) An order under sub-section (1) shall be served personally on the person against whom it is directed in such manner as the authority making the order thinks fit.

Procedure to be adopted in making order under section 4.

5. (1) Before making an order under section 4 the Commissioner of Police or the District Magistrate, as the case may be, shall give an opportunity to the person against whom the order is proposed to be made to show cause against the order, and shall consider such representations as he may make verbally or in writing.

(2) Within forty-eight hours from the making of an order under section 4 the Commissioner of Police or the District Magistrate, as the case may be, shall forward in writing to the Local Government his reasons for making the order.

Power to modify order under section 4.

6. When by an order under section 4 any person has been directed to remove himself from Bengal and has complied with the order, the Commissioner of Police or the District Magistrate, as the case may be, may, of his own motion or upon application made to him in this behalf, if he is satisfied that both such person and the father of such person were born in Bengal or that such person is a member of a family which has definitely settled in Bengal and is himself so settled, modify the order in such manner as to permit such person to return to and remain in any part of Bengal outside the Presidency Area.

Right of appeal.

7. When an order has been served on any person under section 4 and has been complied with by him, his agent authorised by him in writing may petition the Local Government to revoke or modify the order and thereupon the Local Government shall consider such facts and circumstances relating to the case as may be placed before it, and may confirm, modify or revoke the order.

Failure to comply with order.

8. Any person who, having been directed by an order made and served on him under section 4—

(a) to remove himself from the Presidency Area or from Bengal, fails to remove himself therefrom within the time specified in the order.

(*b*) not to return to the Presidency Area or Bengal within a specified period, returns thereto within such period without the written permission of the Commissioner of Police or the District Magistrate, as the case may be,

may be arrested without a warrant by any police-officer, and—

(*i*) may be removed in police custody outside the Presidency Area or Bengal, as the case may be, or

(*ii*) on conviction before a Presidency Magistrate or a Magistrate of the first class, may be punished with rigorous imprisonment for a term which may extend to one year.

Indemnity

9. No suit, prosecution or legal proceeding whatever shall lie against any person in respect of anything which is, in good faith, done or intended to be done under this Act

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